Indian Claims Commission

Athabasca Denesuline Inquiry

Report On: Claim of the Fond du Lac, Black Lake and Hatchet Lake First Nations

DECEMBER 1993

Indian Claims Commission

Commission des revendications des Indiens

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December 21, 1993

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The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

RE: ATHABASCA DENESULINE INQUIRY

On January 25, 1993, the Chief Commissioner delivered notice to you of the Commission's agreement to conduct an inquiry pursuant to the *Inquiries Act*, at the request of the Fond du Lac, Black Lake and Hatchet Lake First Nations, into the rejection of their specific claim, regarding Treaties 8 and 10, herein referred to as the Athabasca Denesuline Inquiry.

.../2

CANADA

Since that date, the Commission has reviewed more than 2300 pages of documents. In addition to the review of these documents, the Commission held an information-gathering session at Fond du Lac, Saskatchewan on May 10 and 11, 1993 and heard 18 elders from the three claimant First Nations of Fond du Lac, Black Lake and Hatchet Lake. On September 17, 1993, the panel of Commissioners on this inquiry heard oral submissions from counsel for the parties on the question of whether the Denesuline have a valid claim for negotiation.

Our review of the history of this claim, analysis and conclusions, and findings and recommendations are contained in the attached report which we are honoured to present to you on his date.

FOR THE INDIAN CLAIMS COMMISSION

Chief Commissioner Harry S. LaForme

Commissioner Carole Corcoran

Commissioner Carol Dutcheshen

INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINE INQUIRY

INTO THE CLAIM OF THE

FOND DU LAC, BLACK LAKE, AND HATCHET LAKE

FIRST NATIONS

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To the Indian Claims Commission
Robert F. Reid, QC / William Henderson
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December 21, 1993

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SUMMARY

INTRODUCTION

On January 25, 1993, the Indian Claims Commission undertook to conduct an inquiry into the specific claim of the Fond du Lac, Black Lake, and Hatchet Lake First Nations, all located in northern Saskatchewan. The claimant First Nations are collectively referred to as the Athabasca Denesųłiné (which is pronounced as Den-ā-sooth-leh-nā in their native language of Chipewyan), throughout the report the claimants are referred to as the Denesųłiné.

The claim of the Denesųłiné arises out of the Government of Canada's denial that the Denesųłiné have treaty rights north of the 60th parallel. In June 1989 and June 1992 the Government of Canada, as represented by the Department of Indian Affairs, took the position that the Denesųłiné surrendered all their rights and interests in lands north of the 60th parallel when they signed adhesions to Treaties 8 and 10 in 1899 and 1907, respectively. The Denesųłiné, on the other hand, maintain they continue to have treaty rights to hunt, fish, and trap throughout all their traditional territories, which includes lands in the Northwest Territories, above the 60th parallel.

This Commission was created in August 1991 to assist the First Nations and Canada in the negotiation and fair resolution of specific claims. One aspect of our mandate as a commission of inquiry is to inquire into specific claims that have been rejected by Canada on the basis that they are not valid claims in accordance with the Specific Claims Policy (published by the Department of Indian Affairs in 1982 in a booklet entitled *Outstanding Business*). The task of this Commission is to make a thorough investigation into such rejected claims and report our findings and recommendations to the claimant First Nation and the Government of Canada.

When considering if a claim is valid, the Commission is to have regard to the Specific Claims Policy and ascertain whether the claim discloses an "outstanding lawful obligation" on the part of the federal government. As this Commission is not a court of law, the inquiry process developed by our Commissioners seeks to ensure that our mandate is not frustrated by the application of technical rules normally applicable in a court. *Outstanding Business* directs that all relevant historical evidence, including evidence which might not be admissible in a court of law, must be taken into account in the assessment of claims. In this inquiry we have adopted this approach.

Issues Before the Commission

The central question which this Commission has been asked to inquire into and report on is whether the Government of Canada owes an outstanding lawful obligation to the Denesųłiné. The claimants assert that Canada's blanket denial of the existence of treaty rights outside the boundaries described in Treaties 8 and 10 in lands north of the 60th parallel constitutes a non-fulfilment of the terms of these treaties. The specific issues before this Commission were framed by the parties as follows:

1 Does the geographical scope of Treaties 8 and 10 extend north of the 60th parallel or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

2 In the alternative, do the claimants have a treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of Treaty 8 and paragraph 8 of Treaty 10?

3 Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize that:
  a) the geographical scope of the treaties extends north of the 60th parallel; or that
  b) the claimants have treaty harvesting rights north of the 60th parallel?

In the interests of expediting the inquiry process, counsel for the parties agreed that the Denesųłiné had used and occupied lands north of the 60th parallel since time immemorial and that they continue to do so today. It was also agreed that the question of whether the Denesųłiné have unextinguished aboriginal title to lands north of the 60th parallel was beyond the scope of this inquiry.

THE COMMISSION'S INQUIRY INTO THE CLAIM

Our investigation into this claim involved the review of over 2300 pages of documents. In addition the Commission had the privilege of visiting Fond du Lac to hear oral testimony from 18 Denesųłiné elders who live in the claimant First Nations of Fond du Lac, Black Lake, and Hatchet Lake. Their testimony was given in their native language of Chipewyan. Although almost 100 years have passed since the signing of the treaties, the Commission was impressed by the detailed accounts provided by the elders.

The Commission was also assisted in its task by counsel for the claimants and the Government of Canada, who provided thorough written and oral submissions on evidence and law. We would like to thank counsel for their able assistance throughout.

THE COMMISSION'S FINDINGS

The Denesųłiné share a special relationship with their traditional territories and identify themselves by reference to those lands. The Chipewyan word "Denesųłiné" means "people of the barrens" and refers to the open tundra almost all of which is found north of the 60th parallel. The Denesųłiné have also been referred to as the "Ethen-eldeli" or "caribou-eaters," and it is on the barren lands that the caribou are most plentiful. The very identity of the Denesųłiné people is inextricably linked to that portion of their traditional territories north of the 60th parallel known as the "barren lands." The Government of Canada agrees that the Denesųłiné hunted, fished and trapped on lands north of the 60th parallel since time immemorial and that they continue to do so today.

On July 25 and 27, 1899, predecessors of the Black Lake and Fond du Lac First Nations signed adhesions to Treaty 8 ("adhesion" to a treaty means that a First Nation signed a treaty which had previously been signed by other First Nations). On August 22, 1907, the forefathers of the Hatchet Lake First Nation signed an adhesion to Treaty 10. The written texts of both treaties provide for the extinguishment of aboriginal interests in specified tracts of lands in exchange for certain rights, including the right to hunt, fish, and trap over the lands surrendered.

The Crown's main purpose was to obtain a surrender over specified tracts of lands as described in metes and bounds descriptions in the treaties. In the case of Treaty 8, the Crown wished to accommodate the mining industry, maintain peaceful relations between the Indians and non-Indians, and minimize its expenses and obligations to the Indians. With respect to Treaty 10, the Crown's main purpose was to clear the title over lands situated inside the newly created provinces of Saskatchewan and Alberta.

When the Treaty Commissioners negotiated Treaty 8, the Denesųłiné were extremely apprehensive about signing the treaties. They feared their traditional way of life based upon hunting, fishing, and trapping would be curtailed. After several days of negotiation, the Denesųłiné agreed to sign only when the Treaty Commissioners assured them that they "would be as free to hunt and fish after the treaty as they would be if they never entered into it." In Treaty 10, the Denesųłiné agreed to sign the treaty only when the Treaty Commissioners promised "they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and . . . that they had the privilege of hunting and fishing as before."

There was no evidence before the Commission that the treaty harvesting rights of the Denesųłiné were ever expressly limited to the geographic area defined by the metes and bounds descriptions in the treaties. The Denesųłiné believed that the treaties protected their rights to hunt, fish, and trap throughout all of their traditional territories, irrespective of the metes and bounds.

After the treaties were signed, the continued to hunt, fish, and trap as they always had. There were periodic enactments of hunting and fishing regulations that curtailed the harvesting activities of the Denesųłiné. However, the Department of Indian Affairs, and other federal departments, promoted and encouraged the claimants' harvesting activities in the NWT. In spite of the curtailment of the Denesųłiné's harvesting activities, the government of Canada, almost without exception, defended their exercise of these rights. In its defence of the exercise of their rights Canada referred to them as traditional rights. Canada held that any interference with their "contravenes the treaty."

The Denesųłiné continued to operate under the assumption that they had treaty rights to hunt, fish and trap north of the 60th parallel until 1989. At that time the Government of Canada advised them, for the first time, that their rights to that portion of their traditional lands were extinguished.

CONCLUSIONS

Based on the evidence before the Commission, we make the following conclusions on the issues.

Issue 1: The Geographical Scope of Treaties 8 and 10

- The evidence does not support the claimants' submission that the boundaries of Treaties 8 and 10 extend beyond the metes and bounds descriptions to include the traditional lands of the Denesųłiné. The traditional territory of the Denesųłiné was not delineated at the time of the signing of the treaties and, for the most part, remain undelineated to this day.

- The Denesųłiné's traditional lands outside the boundaries described in Treaties 8 and 10 were not intended to be "opened for" non-Indian settlement, mining, lumbering, and other such uses at that time. The parties did not intend the boundaries of the treaties to encompass the Denesųłiné traditional lands north of 60° latitude.

Issue 2: Harvesting Rights beyond the Boundaries of the Treaties

The Text of the Treaties

- The language employed in Treaties 8 and 10 is essentially the same. The correct interpretation of the text of the treaties is that the parties intended the right to hunt, fish, and trap to apply to *all* the traditional lands surrendered by the Denesųłiné.

The Relevant Historical Evidence

- Canada's objective was to secure a specific tract of land for settlement and other purposes;
- The objective of the the Denewas to protect their traditional lifestyle;
- The Denesųłiné were extremely apprehensive about entering into Treaties for fear that their traditional way of life, including hunting, fishing, and trapping, would be jeopardized;
- To assuage the concerns of the Denesųłiné, oral assurances were given by the Treaty Commissioners that the Denesųłiné would be "as free to hunt and fish after the Treaty as if they had never entered into it;" and
- There is no cogent evidence that the Treaty Commissioners at any time told the Denesųłiné that their right to hunt, fish, and trap would be restricted to a specific geographic area.
- It is not a reasonable interpretation of the evidence to say that the Denesųłiné knowingly and deliberately gave up all their traditional territory in return for certainty of harvesting rights over a smaller area described by the metes and bounds. Further, this was not where they hunted caribou. It is unreasonable to think that a people known as the "caribou eaters" would have agreed to such an arrangement.
- While the subsequent conduct of the parties is not conclusive, nonetheless it is consistent with our interpretation of the treaties.

Issue 3: Does Canada Have a Lawful Obligation?

- It is not necessary in the case of "non-fulfillment of a treaty or agreement" to show a "breach" of a lawful obligation before a claim may be considered for negotiation under the Claims Policy. Rather, the claim must disclose an "outstanding lawful obligation."

- We find that Canada has treaty obligations in the matter before us. Canada's lawful obligation must include, at a minimum, the requirement to recognize formally the treaty rights in issue, and to ensure that the rights of the Denesųłiné are fulfilled.

- In addition to disclosing an outstanding lawful obligation, to be eligible for negotiation a claim must show some loss or damage capable of being negotiated under the Policy.

- Currently, the Specific Claims Policy and process are ill-equipped to deal with the Denesųłiné's claim as there appears to be no loss or damage capable of being negotiated under the Policy.

- We agree with Canada's submission that this Commission is not entitled to grant declaratory relief. Our mandate, as prescribed by Orders in Council, directs us to inquire into and report on rejected claims and to submit our findings and recommendations to the parties. Declaratory relief is a judicial remedy which is binding on the parties, a relief which we cannot grant.

RECOMMENDATION I

The parties should remain mindful of the spirit and intent of the Policy and process, which is to encourage and support the fair negotiation of outstanding claims. This is best done without the application of technical court rules and procedures.

RECOMMENDATION II

***Outstanding Business* does not strictly allow for the negotiation of this claim. However, other processes for negotiation of similar issues have been established by Canada, one of which is described as "Administrative Referral." As soon as possible, the parties should commence negotiation of the claimants' grievance pursuant to that process.**

PART I

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:
>
> > (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
> >
> > (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[1]

This is an inquiry into a claim that has been rejected by the Minister of Indian Affairs. The claimants, who are referred to collectively as the Athabasca Denesųłiné (hereafter the Denesųłiné), are the Fond du Lac, Black Lake, and Hatchet Lake First Nations, all of which are located in northern Saskatchewan. The following correspondence provides a brief synopsis of how the present claim came before this Commission.

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[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (ICC Exhibit 1).

On June 8, 1989, the Specific Claims Branch of the Department of Indian and Northern Affairs Canada denied the Denesųłiné's request for funding to conduct historical research into their treaty rights and stated that:

> [T]he question as to whether Treaties 8 and 10 extinguished hunting rights north of 60° was submitted to Legal Services for review. This review, along with a separate historical inquiry, has now been completed. It is the conclusion of Legal Services that the Treaties did, indeed, extinguish the rights of the Indians concerned, north of the 60th parallel.[2]

On June 4, 1992, Tom Siddon, Minister of Indian Affairs, wrote as follows to Tribal Chief A.J. Felix of the Prince Albert Tribal Council, the designated representative of the Denesųłiné:

> You indicate that your fundamental objective is to secure recognition of treaty or aboriginal rights over traditionally used lands in the Northwest Territories. On this point, there continues to be a basic disagreement regarding the interpretation of Treaties 8 and 10. As I indicated previously, the Government of Canada's legal interpretation of these treaties is that they surrendered any aboriginal interests of the Saskatchewan bands in southern Keewatin, and that they did not extend treaty rights into that area. The research which you have presented to date has not changed this position.[3]

The Minister's position had been stated earlier in a letter dated June 12, 1991, from Harry Swain, Deputy Minister of Indian and Northern Affairs, to Tribal

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[2] John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, Treaty and Aboriginal Rights Research Centre (TARR), Manitoba, June 8, 1989 (ICC Exhibit 3).

[3] Tom Siddon, Minister of Indian Affairs, to Tribal Chief A.J. Felix, Prince Albert Tribal Council, June 4, 1992 (ICC Exhibit 3).

Chief A.J. Felix, in which Mr. Swain states that:

> [O]ur legal advice is that your aboriginal rights in land north of 60° were surrendered by Treaties 5, 8 and 10 and that actual treaty harvesting rights do not extend beyond the boundary of those treaties.[4]

On December 19, 1991, the Denesųłiné filed a statement of claim in the Federal Court of Canada, Trial Division, seeking, among other things, a declaration that the Denesųłiné have existing treaty and/or aboriginal rights in lands north of the 60th parallel. This action has not yet come before the court.[5]

Counsel for the Athabasca Denesųłiné made a formal request for the Commission to conduct an inquiry into their rejected claim on December 21, 1992.[6] The Commissioners agreed to do so on January 25, 1993, and notice of this intention was provided to the parties on that same day.[7]

On April 13, 1993, Robert Winogron, counsel for Canada, wrote to Chief Commissioner LaForme to advise the Commission that Canada was challenging the

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[4] Harry Swain, Deputy Minister of Indian and Northern Affairs, to Tribal Chief A.J. Felix, Prince Albert Tribal Council, June 12, 1991. This position is further confirmed by Minister Tom Siddon in a letter dated September 10, 1991, to Tribal Chief A.J. Felix, wherein he states, "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights" (ICC Exhibit 3).

[5] Referred to in the Indian Claims Commission Jurisdiction Report dated January 22, 1993 (ICC Exhibit 12).

[6] David Knoll, counsel for the Athabasca Denesųłiné, to Chief Commissioner Harry LaForme, December 21, 1992 (ICC Exhibit 3).

[7] Four letters dated January 25, 1993, from Chief Commissioner LaForme to: the Chief and Council for the Hatchet Lake First Nation; the Chief and Council for the Fond du Lac First Nation; the Chief and Council for the Black Lake First Nation; and the Hon. Tom Siddon, Minister of Indian and Northern Affairs, and the Hon. Pierre Blais, Minister of Justice and Attorney General (ICC Exhibit 4).

Commission's mandate to conduct an inquiry into this claim.[8] On May 6, 1993, a panel of six Commissioners heard legal arguments from Commission counsel and counsel for the parties on this issue. In the Commission's ruling dated May 7, 1993, a copy of which is attached as Appendix A to this Report, the panel found that this inquiry was a matter which properly fell within its mandate.

The purpose of the Commission in conducting this inquiry is to inquire into and report on whether, on the basis of Canada's specific claims policy, the Athabasca Denesųłiné have a valid claim for negotiation.

A SUPPLEMENTARY MANDATE

During the period when revisions to the original mandate of the Commission were still under discussion, the Indian Affairs Minister, the Honourable Tom Siddon, wrote to National Chief Ovide Mercredi of the Assembly of First Nations in the following terms:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[9]

We have borne in mind the implications of our supplementary mandate in making our recommendations.

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[8] Robert Winogron, Counsel, Specific Claims Branch - Ottawa, to Chief Commissioner LaForme, April 13, 1993 (ICC Exhibit 6).

[9] The Hon. Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991.

THE SPECIFIC CLAIMS POLICY

The Indian Claims Commission is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by the Department of Indian Affairs entitled *Outstanding Business, A Native Claims Policy: Specific Claims.*[10] To date, it has been amended only by deleting the exclusion of claims "based on events prior to 1867."[11] Unless expressly stated otherwise, references to "the Policy" in this report are to *Outstanding Business.*

THE ISSUE OF "LAWFUL OBLIGATION"

Although the Commission is directed to look at the entire policy in its review of rejected claims, the focal point of its inquiry, in the context of this claim, is found in the following passage:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> > i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> > ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations

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[10] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business, A Native Claims Policy: Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*] (ICC Exhibit 2).

[11] The exclusion is described in *Outstanding Business*, p. 30. Its removal from the specific claims policy as of 1991 is confirmed in another booklet, *Federal Policy for the Settlement of Native Claims* (Ottawa: DIAND, 1993), pp. iv, 22 (ICC Exhibit 7).

> thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[12]

In our view, the list of examples enumerated under the policy is not intended to be exhaustive.

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[12] *Outstanding Business*, p. 20 (ICC Exhibit 2).

PART II

ISSUES

The central question this Commission has been asked to inquire into and report on is whether the Government of Canada owes an outstanding lawful obligation, as defined in *Outstanding Business*, to the Denesųłiné. In particular, the claimants assert that Canada's blanket denial of the existence of treaty rights outside the boundaries of Treaties 8 and 10 in lands north of the 60th parallel constitutes a non-fulfilment of the terms of these treaties. To assist us in determining whether the evidence before this Commission discloses an outstanding lawful obligation, the parties defined the scope of the inquiry by framing the specific issues before us:

1. Does the geographical scope of Treaties 8 and 10 extend north of the 60° latitude or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

2. In the alternative, do the claimants have a Treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

3. Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize that:
   a) the geographical scope of the Treaties extends north of the 60° latitude; or that,
   b) the claimants have Treaty harvesting rights north of 60° latitude?[13]

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[13] The issues are set out on pages 13-14 of Submissions on Behalf of the Government of Canada.

Counsel for the parties acknowledged that the question of whether the Denesųłiné have unextinguished aboriginal rights north of 60° latitude was beyond the scope of this inquiry.[14] Nevertheless, during this inquiry, counsel for the claimants submitted that Treaties 8 and 10 were intended to protect, and not extinguish, aboriginal rights. Counsel for the claimants submitted that Treaty 8 was in essence "a peace treaty" and that the Denesųłiné did not intend to cede any rights, titles, or interests in their traditional territories.[15] We decline to make any findings on these submissions because issues relating to unextinguished aboriginal title are beyond the scope of our present mandate.

Finally, in the interests of expediting the inquiry process, counsel for the parties were able to agree that the Denesųłiné had used and occupied lands north of the 60th parallel since time immemorial and that they continue to do so today. Counsel also agreed that it was unnecessary for the purposes of this inquiry for the Commission to make specific findings regarding the precise boundaries of the Denesųłiné's traditional land use north of the 60th parallel.[16] Therefore, any references in this report relating to land use and occupation are included only for the purposes of providing a historical context for the inquiry.

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[14] For the sake of clarification, it is noted that, in their action before the Federal Court of Canada, the Denesųłiné raise the issue of unextinguished aboriginal title as an alternative argument to the issues before this inquiry. During a consultation conference on April 1, 1993, counsel agreed that the Commission would not consider this issue.

[15] ICC Transcript of oral submissions from counsel for the claimants, September 17, 1993, p. 48 (Mr. Knoll).

[16] The agreement of the parties was summarized by Commission counsel at the commencement of the community sessions at Fond du Lac on May 10, 1993 (ICC Transcript, vol. 1, p. 9, William Henderson).

PART III

THE CLAIM

THE CLAIMANTS

The claimants in this inquiry are the Fond du Lac, Black Lake, and Hatchet Lake First Nations in northern Saskatchewan. The Athabascan Denesųłiné belong to the Athapaskan linguistic group and speak the Chipewyan language.[17]

The Denesųłiné of the Fond du Lac and Black Lake First Nations are descendants of Maurice's Band, which signed an adhesion[18] to Treaty 8 at Fond du Lac on July 25 and 27, 1899.[19] The Fond du Lac First Nation has three reserves located on the eastern end of Lake Athabasca.[20] The Black Lake First Nation, which used to be known as the Stony Rapids Band, occupies three reserves located on the east and west sides of Black Lake.[21]

The Hatchet Lake First Nation, also known as the Lac la Hache Band, signed an adhesion to Treaty 10 at Brochet, Manitoba, on August 22, 1907. The Hatchet Lake First Nation occupies Lac la Hache Indian Reserve 220 located on the east side of Wollaston Lake. Hatchet Lake itself is located to the northwest of Wollaston Lake and is not the actual location of the Lac la Hache reserve.

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[17] For general historical and anthropological information on the Chipewyan people, see James G.E. Smith, "Chipewyan," in *Subarctic*, June Helm, vol. ed., vol. 6 of *Handbook of North American Indians*, William C. Sturtevant, gen. ed. (Washington: Smithsonian Institution, 1981) [hereinafter Smith, "Chipewyan"], pp. 272-73 (copy in ICC Documents, pp. 744-58).

[18] The term "adhesion" is used where a First Nation agrees to enter into a treaty which has already been entered into between the Crown and other First Nations.

[19] Although the headmen for Maurice's Band signed the treaty on July 25, 1899, Chief Maurice Piche did not sign the treaty until July 27, 1899.

[20] Fond du Lac Indian Reserves 227, 228, and 229.

[21] Chicken Indian Reserves 224, 225, and 226.

DESCRIPTION OF THE CLAIM AREA

Map 1 depicts the claim area in this inquiry and a number of other significant geographical features, including the boundaries of Treaties 8 and 10 (as described in the written texts of the treaties), the location of the Fond du Lac, Black Lake, and Hatchet Lake First Nations, and several lakes that were commonly used by the Athabasca Denesųłiné.

The traditional lands[22] of all Denesųłiné Bands are shown on the map as the shaded area. This includes the traditional lands of the three claimant First Nations and two other Denesųłiné Bands from Manitoba -- the Northlands Band and the Barren Lands Band.[23] The map demonstrates that a significant proportion of these traditional lands have been surrendered to the Crown under Treaties 5, 8, and 10.

Although there was a tendency throughout this inquiry for the parties to suggest that the claim involves "treaty rights north of the 60th parallel," this description is somewhat misleading. In specific terms, the claim area involves that portion of the Denesųłiné's traditional lands which lies north of the 60th parallel

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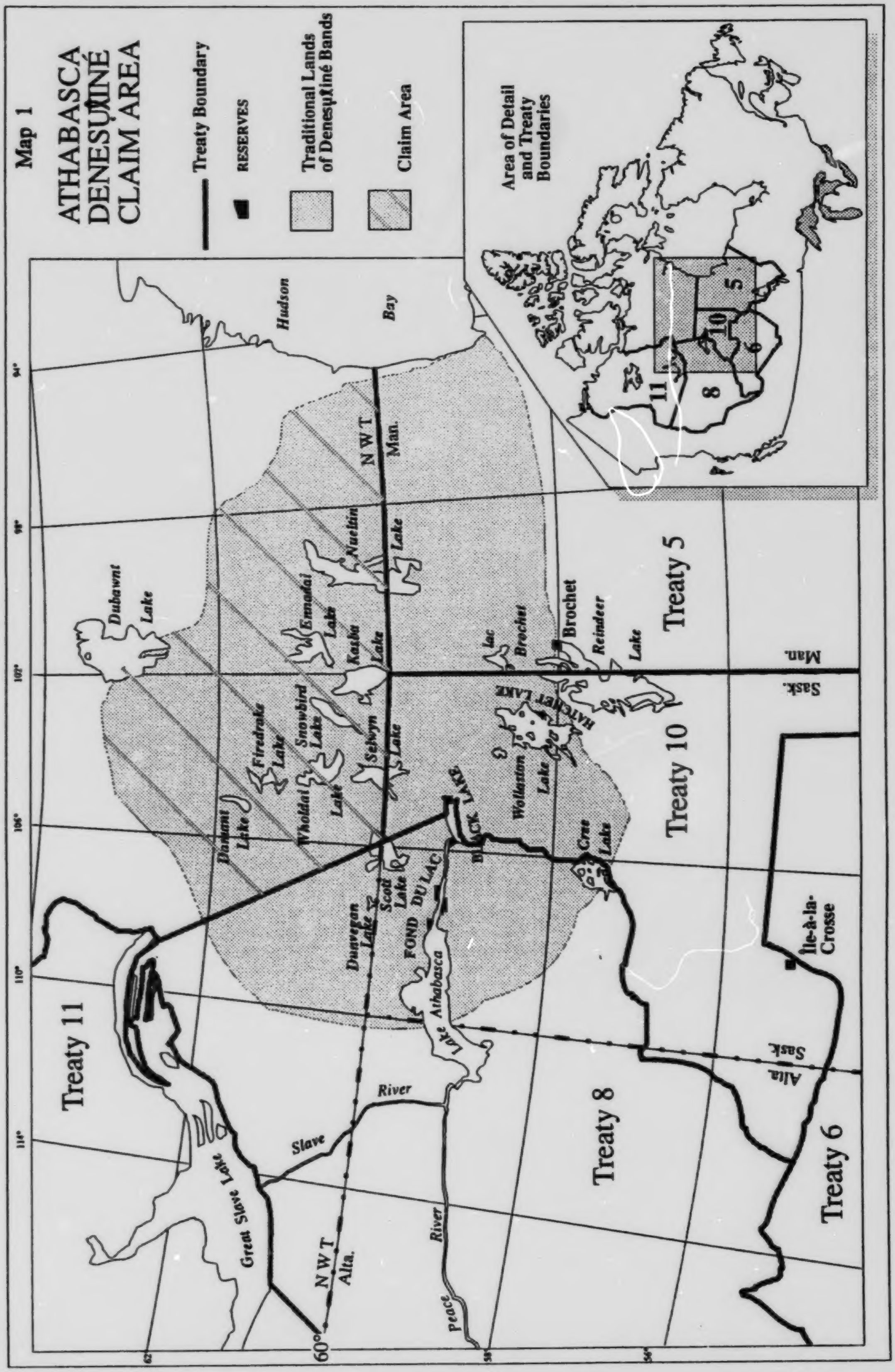
[22] The term "traditional lands" is defined by Peter Usher, a geographer and research consultant, as "the land base with which a group identifies itself and to which it expresses attachment in legend and belief, as well as by long-standing use which may be documented over many generations by archaeological and historical evidence in addition to map biographies. This is what aboriginal people generally mean by 'our land,' and is much more closely represented by occupancy than by use": Affidavit of Peter Usher, July 31, 1992 (ICC Affidavits, Tab A, p. 209).

[23] ICC, Transcript of oral submissions from counsel for the claimants, September 17, 1993, p. 9 (Mr. Knoll).



Map 1

ATHABASCA DENESUŁINÉ CLAIM AREA

Treaty Boundary
RESERVES
Traditional Lands of Denesųłiné Bands
Claim Area
Area of Detail and Treaty Boundaries
11
8
10
6
5
Hudson
Bay
N W T.
Man.
Dubawnt Lake
Nueltin Lake
Ennadai Lake
Kasba Lake
Firedrake Lake
Snowbird Lake
Wholdai Lake
Selwyn Lake
Damant Lake
Dunvegan Lake
Scott Lake
FOND DU LAC
BLACK LAKE
Lake Athabasca
Wollaston Lake
HATCHET LAKE
lac Brochet
Brochet
Reindeer Lake
Cree Lake
Ile-à-la-Crosse
Treaty 5
Treaty 10
Treaty 11
Treaty 8
Treaty 6
Man.
Sask.
Alta.
Great Slave Lake
Slave River
Peace River
N W T
Alta.
60°
94°
98°
102°
106°
110°
114°
62
58
56

and to the northeast of the boundaries of Treaties 8 and 10.[24] This area is shown on the map as the shaded and hatched area. The Denesųłiné maintain they have treaty rights in the claim area even though the boundaries of Treaties 8 and 10, as described in the written texts, do not include that portion of their traditional lands.

Other significant features of the map are as follows. First, the northern boundaries of Treaty 8 include a large tract of land in the Northwest Territories, above the 60th parallel. The northwestern boundary runs along the 60th parallel to Hay River, then goes northeast along the river to the south shore of Great Slave Lake and runs along the shore line. The northeastern boundary of Treaty 8 is a straight line that runs from the eastern end of Great Slave Lake down to the eastern end of Black Lake.

Second, the northern boundary of Treaty 10 runs east to west along the 60th parallel, starting at the Saskatchewan-Manitoba border, to the point at which it intersects with Treaty 8. The eastern boundary of Treaty 10 runs from the 60th parallel south until it intersects with the Treaty 6 boundary.

Third, the boundaries of Treaty 5 are defined by the Saskatchewan-Manitoba border to the west and by the 60th parallel to the north. Finally, the lakes depicted on the map were among the lakes commonly used by the Denesųłiné people.[25]

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[24] The information on this map is based upon a map tendered by the claimants during the inquiry (see ICC Exhibit 13). Counsel for Canada expressly stated that they did not wish to make any submissions on whether this map accurately showed the extent of the traditional lands of the Denesųłiné. We reiterate that we do not intend to make any findings on this issue. It is sufficient for the purposes of this inquiry to find that the Denesųłiné's use and occupation of lands north of the 60th parallel were significant.

[25] These lakes were either referred to in the testimony of the Denesųłiné elders during the inquiry or are referenced in the documentary record before this Commission.

PART IV

THE COMMISSION'S INQUIRY INTO THE CLAIM

Notices of this inquiry were sent to the parties by letter from Chief Commissioner LaForme on January 25, 1993. Since that date, the Commission has reviewed more than 2300 pages of documents. In addition to the review of these documents, the Commission held an information-gathering session at Fond du Lac, Saskatchewan, on May 10 and 11, 1993, and heard 18 elders from the three Denesųłiné communities of Fond du Lac, Black Lake, and Hatchet Lake. On September 17, 1993, the panel of Commissioners on this inquiry heard oral submissions from counsel for the parties on the question of whether the Denesųłiné have a valid claim for negotiation.

In this part of the report, we examine the relevant historical evidence. In addition to the transcripts of the community sessions at Fond du Lac, the Commission considered the extensive documentation, the written and oral submissions of the parties, and the balance of the record of this inquiry. Details of the inquiry process and the formal record of documents and testimony considered in this inquiry can be found in Appendices B and C of this report.

ATHABASCA DENESŲŁINÉ LAND USE AND OCCUPATION

The historical relationship that the claimant First Nations share with their traditional lands north of the 60th parallel is reflected in the fact that they refer to themselves as the "Athabasca Denesųłiné," which means "people of the barrens" in their native language of Chipewyan.[26] The location of "the barrens" is described in a recent decision of the Federal Court of Appeal:

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[26] ICC, Athabasca Denesųłiné Transcript, vol. 1, p. 19 (Mr. Benoanie).

> The "barren lands" is the name applied to that part of the interior of mainland Canada lying north and east of the tree line which meanders from Hudson Bay, north of Churchill, Manitoba, to the Mackenzie River Delta north of Inuvik, N.W.T. They are strewn with lakes and laced by rivers and streams.[27]

Anthropological evidence confirms that the Chipewyan people, of which the Denesųłiné are members, historically occupied "the northern transitional zone of the boreal forest and the barren grounds beyond."[28] The barren lands are located almost entirely north of 60° latitude.

The Denesųłiné are also known as the "Ethen-eldeli," which is Chipewyan for "caribou-eaters."[29] This description of the Denesųłiné is significant because, in addition to the various fur-bearing animals of the boreal forest region,

> the Barren Ground caribou was of overwhelming importance to the Chipewyan, structuring their seasonal cycle, seasonal distribution, socioterritorial organization, and technology; it was the focus of religious beliefs and oral literature. It is readily apparent why those Chipewyan who clung to their traditional lands . . . were still known in the 1970s as the "caribou eaters."[30]

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[27] This passage is taken from Mahoney J's decision in *Hamlet of Baker Lake v. Minister of Indian Affairs*, [1979] 3 CNLR 17 at 21 (Fed. CA).

[28] Smith, "Chipewyan," 271 (ICC, Documents, at 745).

[29] Ibid.

[30] Ibid., pp. 272-73 (ICC Documents, pp. 746-47). The historical record indicates that the term "caribou-eater" was commonly used by government officials and missionaries as a reference to the Denesųłiné: see, for example, George Simpson, *Journal of Occurrences in the Athabasca Department, 1820 and 1821, and Report*, ed. E.E. Rich, Hudson's Bay Record Society Publications, 1 (London: Hudson Bay Record Society, 1938) [hereinafter *Simpson's Athabasca Journal*], p. 361 (ICC Documents, p. 39); *"Missions de la Congrégation des Missionnaires Oblats de Marie-Immaculée,"* December 1870, p. 25 (ICC Documents, p. 91); René Fumoleau, *As Long As This Land Shall Last*

In the first half of the nineteenth century, trading posts were established in Chipewyan territory on Lake Athabasca. James G.E. Smith, an anthropologist, writes that "[t]he demand for furs in the competitive period [about 1763-1821] and the low prices for trade goods were significant in the shift of some Chipewyans from the forest-tundra ecotone into the full boreal forest."[31] In 1821 Hudson's Bay Company Governor George Simpson wrote regarding Fort Wedderburn on Coal Island, near the western extremity of Lake Athabasca:

> The Chipewyans do not consider this part of the Country to be their legitimate Soil; they come in large Bands from *their own barren Lands situated to the North of this Lake*, extending to the Eastern extremity of Gt. Slave Lake and embracing a large Track of Country towards Churchill . . . they shook off their indolent habits, became expert Beaver hunters, and now penetrate in search of that valuable animal into the Cree and beaver Indian hunting Grounds, making a circuit easterly by Carribeau Lake; to the South by Île-à-la-Crosse; and Westerly to the Banks of Peace River . . . The greater proportion of them however remain *on their own barren Lands*, where they procure sustenance with little exertion as the Country abounds with Rein Deer, and some years nearly the whole of them retire thither.[32]

Simpson also noted that Harrison's House, located on the eastern end of Lake Athabasca, was established "to attract the Chipewyans who generally reside on their Lands (usually called Carribeau Eaters) towards the Rich hunting Grounds to the

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(Toronto: McClelland & Stewart, 1975), p. 80 (ICC Documents, p. 296); and Treaty Commissioner J.A. Macrae to Superintendent General of Indian Affairs, December 11, 1900, in *Treaty No. 10 and Reports of Commissioners* (1907; repr. Ottawa: Queen's Printer, 1966), p. 20 (ICC Documents, p. 393).

[31] Smith, "Chipewyan," p. 273 (ICC Documents, p. 747).

[32] *Simpson's Athabasca Journal,* 355 (ICC Documents, p. 33). Emphasis added.

Southward and Westward."[33]

In the 1840s the Oblates of Mary Immaculate began to establish missions in the north for the purpose of converting the Denesųłiné. The centre of their operations was at Île-à-la-Crosse, but they also set up a mission at Brochet, on the north end of Reindeer Lake.[34] The records of the Oblate missionaries confirm that it was not enough simply to wait for the Denesųłiné to come to them; the missionaries had to travel great distances into the barren lands to preach the gospel to the people.[35]

In 1881, several years prior to the signing of the treaties, Denesųłiné guides directed A.S. Cochrane of the Geological Survey of Canada, Department of Interior, from Reindeer Lake to Hatchet (Wollaston) Lake and from there to Lake Athabasca. In his field-book entries, Cochrane makes several references which indicate that the Denesųłiné travelled in, and were very familiar with, lands north of the 60th parallel.[36] In 1893 and 1894 Joseph Tyrrell, another surveyor with the Geological Survey of Canada, explored lands occupied by the Denesųłiné.[37] The information collected by these surveyors, which was conveyed back to Ottawa via the Geological Survey of Canada, confirmed that the Denesųłiné depended upon their traditional lands north of the 60th parallel.[38]

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[33] *Simpson's Athabasca Journal*, 361 (ICC Documents, p. 39).

[34] Smith, "Chipewyan," 273 (ICC, Documents, p. 747), and Father Arsene Turquetil in *Missions de la Congrégation des Missionnaires Oblats*, No. 198, June 1912 (Morrison translation) [hereinafter cited as Turquetil, *Missions*], pp. 177-85 (ICC Documents, pp. 49-71).

[35] See, generally, Turquetil, *Missions* (ICC Documents, pp. 49-71). Also see *Missions de la Congrégation des Missionnaires Oblats de Marie Immaculée*, Tome Sixième (Paris, 1867), p. 521, in which a report of the Oblate missionaries confirms that the Denesųłiné had no natural tendency to migrate south but did so only for the purposes of trade (ICC Documents, p. 84).

[36] A.S. Cochrane, Field Notes, National Archives of Canada [hereinafter NA], RG 45, vol. 138, Field Books 1168 to 1771 (ICC Documents, pp. 216-19).

[37] See, generally, "Summary Report of the Geological Survey Department for the year 1894," in Canada, House of Commons, *Sessional Papers*, No. 13A, 1895, pp. 11-16 (ICC Documents, pp. 237-42); J.W. Tyrrell, *Across the Sub-Arctic of Canada, A Journey of 3,200 Miles by Canoe and Snowshoe through the Barren Lands* (London: T. Fisher Unwin, 1898), p. 78 (ICC Documents, p. 248); Geological Survey of Canada, Field Notebooks, 1892, NA, RG 45, vol. 174, Field Books 1926 to

The evidence of the Denesųłiné elders was that, for most of the year, the Denesųłiné lived and travelled north of the 60th parallel. Many Denesųłiné elders testified during the community sessions on May 10 and 11, 1993, that, even today, they continue to hunt, fish, and trap in their traditional territories and that many of them live north of 60° latitude for as much as half the year or more. They testified they will continue to do so for as long as they can.

> A lot of the people lived on this land for a long time. There's all kinds of people: there's Inuit, there's Cree, there's Dene as well too. You have to remember that the land that we're talking about was Dene lands. A lot of the people live most of the year out in the barren lands and they're called barren lands people, Denesuline. You have people, First Nations people, living all over the place.
>
> . . .
>
> . . . And some of the people even though they live in the south here, they would still travel north for trapping, hunting, to carry on traditional practices. That's how people lived on the land in those days; there were no boundaries. They travelled all over. Because we were told in the treaties that this was your land, you are to live on the land as you feel. That's what we were told and that's what we continue to do.[39]
>
> -- Louis Benoanie

1940 (ICC Documents, pp. 773-96). The extent of Tyrrell's explorations are depicted in a 1901 map (ICC Documents, p. 395).

[38] See, generally, Canada, House of Commons, *Sessional Papers*, No. 13A, 1895, pp. 40-50 (ICC Documents, pp. 252-63), and *Sessional Papers*, No. 15, 1898, p. 161 (ICC Documents, p. 265).

[39] ICC Transcript, vol. 1, pp. 19 and 24 (Louis Benoanie).

> You see this road that's coming here and that's the road that travels way up north, if you could get on this road that's travelling north, that's people's trap line. They can go way up the Territories on the same route here.
>
> I would not give up my land where I am. I don't care where it is up north where my trap line is going to be. I'll never give up my land. My land is there and that's the land I'm living off and that's the land I'm raising my family on. And if wasn't for that land I would have starved to death already.
>
> . . .
>
> And now like today, I told my kids and my grandchildren, they're going to follow what I said and they're going to believe what I tell them. I believe that I would not give up my land and my kids and my grandchildren, they're going to follow my footstep and they're going to do the same thing. That's the only way. We live off the land and we will continue doing that.[40]
>
> -- Norbert Deranger

TREATY 8

Background

As railway construction and public works projects expanded northward in the 1880s, the Indians to the north of Treaty 6 and Hudson's Bay Company officials made numerous petitions for a treaty covering that area.[41] The government declined the petitions for a treaty "on the ground that the lands within the regions inhabited by them were not required for settlement."[42]

Interest in the treaty-making process was renewed when the discovery of gold in the Yukon in 1896 caused a large influx of non-Indians -- largely gold-miners, prospectors, and traders -- to pass through what is now northern Alberta and Saskatchewan. In 1898 the government appointed David Laird, J.H. Ross, and J.A.J. McKenna as Treaty Commissioners to negotiate Treaty 8 with the Indian inhabitants to the north of Treaty 6. An order in council dated June 27, 1898, gave the Treaty Commissioners the discretion to decide what territory would be included within the treaty.[43] Commissioner Laird explained how the Treaty Commissioners decided upon the actual treaty boundaries:

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[40] ICC Transcript, vol. 1, pp. 31-32 (Norbert Deranger).

[41] The northern boundary of Treaty 6 runs east to west across the northern half of the provinces of Saskatchewan and Alberta, slightly south of the55th parallel.

[42] Superintendent of Indian Affairs to Privy Council of Canada, January 19, NA, RG 10 vol. 4006, file 241, 209-1 (ICC Documents, p. 222).

> The scope of the Commissioners' instructions was to obtain the relinquishment of the Indian and Halfbreed title in that tract of territory north of Treaty 6 to which Governmental authority had to some extent been extended by sending Northwest Mounted Police there to protect and control whites who were going into the country as traders, travellers to the Klondike, explorers, and miners. The territory watered by the Lesser Slave Lake, the Peace and Athabasca Rivers, the Athabasca Lake, the South of Great Slave Lake and their tributaries, was where these whites were finding their way, and the Commissioners did not deem it necessary to extend Treaty 8 farther than they did.[44]

The description of the treaty area offered by Commissioner Laird roughly corresponds with the metes and bounds description contained in Treaty 8.[45]

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[43] Richard Daniel, "The Spirit and Terms of Treaty Eight," in *The Spirit of the Alberta Indian Treaties*, ed. Richard Price (Montreal: Institute for Research on Public Policy, 1979), p. 71, n. 90 (ICC Documents, p. 302).

[44] Fumoleau, *As Long As This Land Shall Last*, p. 60 (ICC Documents, p. 289).

[45] The metes and bounds description in Treaty 8 is as follows:
Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence

In January 1899 Clifford Sifton, Superintendent General of Indian Affairs, wrote to the Reverend Charles Weavers, a missionary who had made inquiries on behalf of the Indians regarding the upcoming treaty negotiations. In that letter, Sifton commented:

> 2. The game and fishery laws will, of course, apply to the country; but as the manner and extent of their enforcement must necessarily depend upon conditions of settlement so, there is not likely to be any marked change on account of the making of the treaty.
>
> 3. There will be reserves set aside for the Indians and in doing so everything possible will be done to meet their wishes to the selection of localities. There will be no general prohibition in consequence of the treaty of the freedom of the Indian in roaming and hunting over the country. Of course when settlement advances, there will be the restriction which necessarily follows, and it is to that such contingencies that reserves are set aside.[46]

In February 1899 Commissioner Laird provided the following instructions to the government's field representatives in an effort to clarify the "misleading

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northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the island in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said Lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement. (*Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.* [1899; repr. Ottawa: Queen's Printer, 1966], p. 12, ICC Documents, p. 355).

[46] Clifford Sifton to the Reverend Charles Weaver, January 26, 1899, NA, RG 10, vol. 3848, file 75236-1 (ICC Documents, p. 268).

reports . . . being circulated among the Indians" of the Athabasca and Peace River area about the proposed treaty:

> You may explain to them that the Queen or Great Mother while promising by her Commissioners to give them Reserves, which they can call their own, and upon which white men will not be allowed to settle without payment and the consent of the Indians before a Government officer, yet the Indians will be allowed to hunt and fish over all the country as they do now, subject to such laws as may be made for the protection of game and fish in the breeding season; and also as long as the Indians do not molest or interfere with settlers, miners or travellers.[47]

The Relevant Terms of Treaty 8

On June 21, 1899, negotiations between the Treaty Commissioners and the Indians at Lesser Slave Lake culminated in the signing of Treaty 8.[48] The claimants in this inquiry were not parties to the original treaty signing at Lesser Slave Lake. After the signing of the treaty, the Treaty Commissioners split up for the purposes of obtaining adhesions to the treaty with other Indian bands.[49] On July 25 and 27, 1899, Maurice's Band signed an adhesion to Treaty 8 at Fond du Lac. Maurice's Band was named after Maurice Piche (also known as Moberley), the Chief who signed Treaty 8 in 1899; it later split into the Fond du Lac and Black Lake (Stony Rapids) Bands.

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[47] Commissioner D. Laird to "Sir," February 3, 1899, NA, RG 10, vol. 3848, file 75236-1 (ICC Documents, p. 271).

[48] See, generally, Fumoleau, *As Long As This Land Shall Last*, pp. 58-63 and 77-82 (ICC Documents, pp. 286-300).

[49] During the summer of 1899, the Treaty 8 Commissioners obtained adhesions to the treaty at eight different locations with various bands who agreed to sign the treaty based on the terms concluded at Lesser Slave Lake.

Treaty 8, which was drafted by the Treaty Commissioners on June 20, 1899, contained the following provisions dealing with the surrender of Indian land rights. The preamble to the treaty reads:

> AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian People may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

The operative clauses dealing with the surrender of Indian rights and titles over specified tracts of land are as follows:

> AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: --
>
> [Metes and bounds description of the treaty area]
>
> AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia or in any other portion of the Dominion of Canada.[50]

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[50] *Treaty No. 8*, p. 12 (ICC Documents, p. 355). A copy of Treaty 8 is attached as Appendix D to this report.

Of particular importance is the clause dealing with the harvesting rights of the Treaty 8 Indians:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[51]

The Treaty Negotiations and Oral Assurances

In his report on the treaty negotiations, Commissioner Laird wrote the following account of the discussions that took place at various stages throughout the treaty tour:

> As the discussions at the different points followed on much the same lines, we shall confine ourselves to a general statement of their import . . . There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges . . .
>
> . . .
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the

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[51] Ibid.

> interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.
>
> We assured them that the treaty would not lead to any forced interference with their mode of life.[52]

Charles Mair, a secretary to the Half-Breed Commission for the Treaty 8 area, wrote this eyewitness account of Laird's statements to the Indians assembled at Lesser Slave Lake for the signing of the original treaty:

> We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that you will be just as free after signing a treaty as you are now . . . Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.[53]

Mair also related the following statements made by the Reverend Father Lacombe, who acted as adviser to the Treaty Commissioners during the negotiations at Lesser Slave Lake:

> I consented to come here because I thought it was a good thing for you to take the Treaty. Were it not in your interest I would not take part in it . . . Your forest and river life will not be changed by the Treaty . . . as long as the sun shines and the earth remains. Therefore, I finish my speaking by saying, Accept![54]

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[52] Report of the Commissioners for Treaty No. 8, September 22, 1899, in *Treaty No. 8*, pp. 6-7 (ICC Documents, p. 362).

[53] Charles Mair, *Through the MacKensie Basin* (London, 1908), p. 56 (ICC Documents, p. 278).

[54] Ibid.

After further discussions on June 21, 1899, the Chiefs and headmen agreed to sign Treaty 8.

Father Breynat, a missionary who assisted the Treaty Commissioners in their negotiations with Maurice's Band at Fond du Lac on July 18, 1899, noted that similar concerns were raised by the Denesųłiné in respect of their harvesting rights:

> Right after the text of the proposed treaty had been read, translated and explained, the Honorable Laird knocked at my door.
>
> "Complete failure!" he said. "We must fold down our tents, pack our baggage and leave."
>
> He explained that as soon as the discussion started, Chief Moberley[55] . . . nearly got into a fight with the interpreter, good-natured Robillard . . .
>
> "Evidently there is nothing we can do," added Laird pitifully, with tears in his eyes. He was a good man with a sensitive heart. I offered him my sympathy:
>
> "Let me try," I said, "everything might turn out all right."
>
> Chief Moberley was the very best hunter of the entire tribe . . . He feared that the treaty might restrain his freedom. His pride could only despise the yearly five-dollar bait offered to each of his tribesmen in return for the surrender of their rights, until then undisputed, and which, one must admit, rightly so -- he held incontestable.[56]

During the community sessions at Fond du Lac, this Commission heard the testimony of Denesųłiné elders from Fond du Lac and Black Lake. It illustrates their understanding of Treaty 8 and the significance of the oral assurances given by the Treaty Commissioners that their rights to live on the land would not be affected if they signed the treaty. This testimony, which is based on information handed down to them by Denesųłiné elders who were present at the treaty negotiations, is almost unanimous and tends to corroborate the documentary evidence on this subject.

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[55] Chief Moberley was also known as Maurice Piche, the original Chief of Maurice's Band (Fond du Lac and Stony Rapids).

[56] Fumoleau, *As Long As This Land Shall Last*, pp. 79-80 (ICC Documents, pp. 295-96).

> When the treaty negotiations began there were heavy discussions. And people were very apprehensive in even taking treaty money at first because the people could see that this was a deal that would more than likely create hardships for their people in the future.
>
> And the negotiations went on for almost a week and then the treaty commissioners, along with the other people, the people on our side were very apprehensive, like I was just mentioning. And it seemed like the treaty commissioners were going to outrightly cry to try and convince us.
>
> And the treaty commissioners told the people that as long as you see the big rock across the waters there, that this river flows here, and the sun shines, as long as those three things don't move or are not changed at all, and as long as this land shall last, that you will not be deterred from exercising your right to live on the land in any way in the future.[57]

-- Leon Fern (Samuel)

> . . . the treaty commissioners said, that if you take this paper called money that your rights, your freedom to live on the land would be protected right to the last person, right to the last Dene person who is living on this earth.
>
> As far as maps and writing down the details of the negotiations, those were all foreign to us because we were not even familiar with that concept of writing and maps and that type of detail.[58]

-- Celeste Randhile

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[57] ICC Transcript, vol. 1, p. 92 (Leon Fern [Samuel]).

[58] Ibid., vol. 1, p. 108 (Celeste Randhile).

> At the time that the treaty was going to be signed, everybody was out on their trap lines, and words had travelled that there was going to be some kind of a meeting in Fond du Lac. So they were told to travel back to Fond du Lac because there was going to be an important meeting.
>
> . . .
>
> . . . They sat around 10 days before that they decided that they would take the money. And then they were told that as long as that rock across the lake is there and the sun is shining, the river is flowing, that they would never be broken, the treaties were made.[59]

-- Norbert Deranger

> . . . when you look at harvesting rights, use of the land, all those types of things, there's more and more regulations and restrictions being placed upon us. That's why we're being told now.
>
> In the treaties we didn't agree to those terms. Why is it happening now? We didn't ask for it, like I said. What we asked for was the complete opposite. We wanted to live on the land. To move freely on the land. To live as a people on the land.
>
> . . .
>
> And the treaty commissioner was even crying when they tried to get us to go along with the treaty. He said, my children, you're taking this treaty here so that you can have a better life for your people. That's what he told us and we agreed to it under our conditions . . .[60]

-- Senator Louis Chicken

> At the Treaty negotiations, the Commissioner told us "This money is for the future." He had tears in his eyes. He wanted to strike a deal so badly. Chief Maurice Piche spoke for the Denesuline. "We need our rights to our land." That is what he told the Treaty Commissioner. Our people were afraid that there would be talk of land, fish and all

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[59] Ibid., vol. 1, pp. 127-29 and 130-31 (Norbert Deranger).

[60] Ibid., vol. 2, pp. 4 and 18 (Senator Louis Chicken). Louis Chicken, who was once Chief of the Stony Rapids Band, is currently a Senator of the Federation of Saskatchewan Indians and a member of the Black Lake First Nation.

> we need to survive. The Government said "No, there's no need to feel that way. Those things will not be taken from you. This land from here to where the muskox roam will never be talked about. As long as the sun shines, and that rock does not move, things will not be different for you. Do not be afraid of that.
>
> The people were not shown a map of the Treaty area. There were no maps. The leaders agreed to the terms as outlined by the Treaty Commissioner. Land was never discussed in the treaty. Now, they've pretty well divided us up. That's not what our Chief agreed to. If we had known how it would be, our leaders would likely have rejected the deal. The government would have been sent back.[61]

-- Affidavit of John Laban

The testimony of the Denesųłiné elders respecting the negotiations at Fond du Lac in 1899 is also consistent with accounts of the discussions which took place at the treaty adhesion at Fort Chipewyan. Father Breynat, who was present at the Fort Chipewyan adhesion negotiations, described the discussions as follows:

> Crees and Chipewyans refused to be treated like the Indians of the South, on the Prairies, and be parked on Reserves. The country around Lake Athabasca was not propitious for farming. It was essential that they keep their freedom of movement, which they had always enjoyed in the past. Hunting and fishing had always provided sustenance for them and their families. They categorically refused to submit to any other kind of lifestyle. Nomads they were, nomads they would stay. White people could come to take the gold and silver from these lands. They would not be molested. They themselves had no use for gold and silver. But leave them the caribou, the fish and the fur animals.
>
> The High Commissioner, in the name of Queen Victoria, -- Grandmother, as the Indians called her -- gave them assurances that their wishes would be respected.[62]

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[61] Affidavit of John Laban, June 22, 1992, ICC Affidavits, Tab D, paras. 4 and 5.

[62] Gabriel Breynat, *Cinquante ans au pays des neiges: I - Chez les Mangeurs de Caribous*, (Montreal, 1945), pp. 186-87 [ICC translation] (ICC Documents, p. 352).

TREATY 10

Background

Subsequent to the negotiation of Treaty 8, the Department of Indian Affairs received numerous petitions to extend the treaty provisions to include the Indians at Portage la Loche and Île-à-la-Crosse.[63] On July 12, 1906, the government authorized by Order in Council the making of Treaty 10 and appointed J.A.J. McKenna as the Treaty Commissioner. The Order in Council stated that:

> [I]t is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines.[64]

When Indian Affairs officials in Ottawa began preparations in 1906 to have a new treaty negotiated in northwestern Canada, the Deputy Superintendent General expressed the opinion that the government should not extend the boundaries of the proposed treaty any further than the 64th parallel (which is roughly parallel with the northern boundary of Treaty 8). That was because the surrender of Indian title over lands which had limited agricultural potential would entail a significant outlay of funds by the government.[65]

The boundary of Treaty 10, as set out in the metes and bounds description, roughly encompasses the northeastern third of the Province of Saskatchewan, with a small jog into northeastern Alberta near Cold Lake.[66] We find that one of the main reasons the government entered into Treaty 10 was because:

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[63] The communities of Portage la Loche and Ile-à-la-Crosse are located in Saskatchewan just south of the Treaty 8 boundary and are close to one another. Map 1 shows Ile-à-la-Crosse. Deputy Superintendent General Frank Pedley to Superintendent General of Indian Affairs, April 7, 1906, NA, RG 10, vol. 4006, file 241, 209-1 (ICC Documents, p. 405).

[64] Order in Council PC 1459, July 12, 1906, cited in ICC, "Primrose Lake Air Weapons Range Report on Canoe Lake Inquiry and Cold Lake Inquiry," August 1993, p. 11.

[65] Frank Pedley to Superintendent General of Indian Affairs, April 7, 1906, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents, p. 407).

> Unlike previous treaties, the lands identified in Treaty 10 were delimited for purely political reasons as they "cleared title in the newly formed provinces of Saskatchewan and Alberta."[67]

The Relevant Terms of Treaty 10

Negotiations between Treaty Commissioner McKenna and the Indians at Île-à-la-Crosse and Canoe Lake culminated in the signing of Treaty 10 at those sites on August 28 and September 19, 1906, respectively. The claimants were not signatories to the original treaty signed on those dates. However, on August 22, 1907, the Chiefs and headmen of the Lac la Hache Band (now known as the

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[66] The metes and bounds description of Treaty 10 reads as follows:

> Commencing at the point where the northern boundary of Treaty Five intersects the eastern boundary of the province of Saskatchewan, thence northerly along the said eastern boundary of four hundred and ten miles, more or less, to the sixtieth parallel of latitude and northern boundary of the said province of Saskatchewan; thence west along the said parallel one hundred and thirty miles more or less, to the eastern boundary of Treaty Eight; thence southerly and westerly following the said eastern boundary of Treaty Eight to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary of Treaty Six to its intersection with the western boundary of the addition to Treaty Six; thence northerly along the said western boundary to the northern boundary of the said addition; thence easterly along the said northern boundary in the eastern boundary of the said addition; thence southerly along the said eastern boundary to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary and the northern boundary of Treaty Five to the point of commencement. (*Treaty No. 10*, ICC Documents, pp. 435-36).

[67] G.J. Fedirchuk and E.J. McCullough, "Historical Context: Treaties 6, 8, 10" (Indian Claims Commission, 1993) [hereinafter cited as Fedirchuk and McCullough], p. 63.

Hatchet Lake First Nation) signed an adhesion to Treaty 10 at Brochet, Manitoba. The text of Treaty 10, drafted in Ottawa by the Department of Justice, was based on the terms of Treaty 8 and is essentially identical in its construction.[68] The relevant provisions of Treaty 8 are set out on pages in Appendix D of this report for reference purposes.

The Treaty Negotiations and Oral Assurances

On January 18, 1907, Commissioner McKenna reported to Ottawa on the negotiations that took place during the original signing of Treaty 10 with the Indians at Île-à-la-Crosse and Canoe Lake. In his report, McKenna made the following comments:

> There was a general expression of fear that the making of the treaty would be followed by the curtailment of their hunting and fishing privileges, and the necessity of not allowing the lakes and rivers to be monopolized or depleted by commercial fishing was emphasized . . .
>
> . . . *I pointed out to them that the government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty was made as existed before it*; and that Indians would be expected to make as good use of them in the future as in the past . . .
>
> *I guaranteed that the treaty would not lead to any forced interference with their mode of life* . . . I dwelt upon the importance, in their own interest, of the observance of the laws respecting the protection of fish and game . . .
>
> The Indians were given the option of taking reserves or land in severalty, when they felt the need of having land set apart for them. I made it clear that the government had no desire to interfere with

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[68] Acting Deputy Minister, Department of Justice, to Secretary, Department of Indian Affairs, August 2, 1906, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents, p. 409). The entire text of Treaty 10 is set out in Appendix E to this report.

> their mode of life or to restrict them to reserves and that it undertook to have land in the proportions stated in the treaty set apart for them, when conditions interfered with their mode of living and it became necessary to secure them possession of land.[69]

In 1907 Thomas Borthwick was appointed Treaty Commissioner to negotiate adhesions to Treaty 10 at Reindeer Lake and Stanley Lake.[70] Commissioner Borthwick was instructed by Indian Affairs that the written terms of the treaty provided to him "should not be added to or curtailed; and you should be careful not to make any verbal promises as varying or extending the terms of the treaty."[71]

On August 19, 1907, Commissioner Borthwick met with the Denesųłiné of the Lac la Hache and Barren Lands Bands[72] at Lac du Brochet on the north end of Reindeer Lake to negotiate an adhesion to Treaty 10.[73] Borthwick provided the following account of his discussions with the Denesųłiné:

> [O]ne of their elderly men, Petit Casimir, by name, representing the Barren Lands' Band spoke and said that this was the first time they

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[69] Treaty Commissioner J.A.J. McKenna to Superintendent General of Indian Affairs, Frank Oliver, January 18, 1907, in *Treaty No. 10*, pp. 7-8 (ICC Documents, pp. 423-24). Emphasis added.

[70] The Lac la Hache Band, one of the claimants in this inquiry, adhered to this treaty at Reindeer Lake on August 22, 1907.

[71] Secretary, Department of Indian Affairs, to Indian Agent T.A. Borthwick, April 29, 1907, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents, p. 426).

[72] The Barren Lands Band is now known as the Lac Brochet First Nation in Manitoba. Although the people of Lac Brochet are members of the Athabasca Denesųłiné, they are not claimants in this inquiry.

[73] It should be noted that Lac du Brochet is simply called Brochet today and is not to be confused with Lac Brochet, Manitoba, which is north of Reindeer Lake where the adhesion to Treaty 10 was signed. It is also interesting to note that Brochet is situated within the boundaries of Treaty 5 and not Treaty 10. Please refer to Map 1 for location of Brochet.

> were told of the value of money, but they were glad to hear what the Commissioner had told them, they, however, he said were anxious to know to what extent the Treaty if they accepted it would effect their present system of hunting and fishing in their country. This query was satisfactorily answered and explained by the Commissioner. The spokesman, Casimir, then asked that the terms of the Treaty be read and explained to them. That was then done sentence by sentence, effectively by the Rev. Father Turquetil, in their own language, the Chipewyan. After which was done and a few interrogations were answered by the Commissioner, the spokesman, Petit Casimir, said that so far as the Barren Lands Indians for whom he was then speaking, were concerned, they were willing to accept the Treaty on the terms offered them . . . the Chief [of the Barren Lands Band] said that on behalf of his people he would like to know if in the event of another person coming to deal with them from time to time, he would or could change the agreement which they were now entering into. The Commissioner answered in the negative . . .
>
> . . . Chief, Petit Casimir, addressing the Commissioner said that his people after they left the meeting at noon, complained to him that the money which he (the Commr) was giving them, viz:-- $12.00 each this year and $5.00 for every year hereafter, was not enough to support them. *The Commissioner explained to them that the money which the Government was giving them was a gift, and did not expect them to be pendent [sic] or live upon it, as they were not depriving them of any of the means of which they have been in the habit of living upon heretofore, and added that they had the privilege of hunting and fishing as before* . . . Thus, the terms of the Treaty in all its bearings having been fully explained to them in their own language, the Commissioner asked them if they understood what was required of them by the Treaty, and they answered that they did. The Chief and Headmen then signed the Treaty.[74]

Before signing the treaty, the Lac la Hache Band required three additional days to consult with those band members who were not present during the above discussions. On August 22, 1907, the Lac la Hache Band reassembled with the Treaty Commissioner after selecting their Chief and headmen. Commissioner Borthwick's account of the discussions on that day indicates that the terms of the treaty were

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[74] Treaty Commissioner T.A. Borthwick to Department of Indian Affairs, August 19, 1907, NA, RG 10, vol. 4006, file 241,209-1 (ICC Documents pp. 428-31). Emphasis added.

> read and explained clause by clause to them, the Rev. Pere Turquetil acting as Interpreter in the Chippewyan language. After the reading and translating of the terms of the Treaty was done for them, the Commissioner asked them if they understood the terms of the Agreement that they were being asked to enter into and they answered in the affirmative. They were then asked to come forward and sign the Treaty, which was done by the Chief and his two Headmen on behalf of the Band.[75]

As with Treaty 8, the understanding of the Denesųłiné with respect to the treaty negotiations is illustrated in the following excerpts from the testimony of elders from Hatchet Lake. The testimony given by the elders during the inquiry supports the conclusion that the Denesųłiné agreed to sign the treaty only after Treaty Commissioner Borthwick provided solemn assurances that their rights to hunt, fish, and trap throughout their lands would not be curtailed.

> So when the people started to discuss this amongst themselves, they said that this treaty is only going to bring hardships to our people. So then they had great apprehension to take the treaties then because they knew that what the land provides for them, the freedom on that land, is all that they required when the treaties were being negotiated, to live as a people.
>
> So after some more discussions and negotiations . . . the treaty commissioner told the people that this land that we're talking about

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[75] Treaty Commissioner T.A. Borthwick to Department of Indian Affairs, August 22, 1907, NA, RG 10, vol. 8595, file 1/1-11-6 (ICC Documents, pp. 432-34).

> here is your land; we're not talking to you about that, we're talking to you about, you know, the freedom to live on the land, the freedom to hunt, fish, hunt fowl, whatever you live off of today, those are the things that are not on the discussion table here.
>
> . . . You have to understand that we didn't read or write in those days, we just spoke the language. We didn't have too many people who spoke English or understood it.
>
> . . .
>
> Over at Brochet . . . there's a big rock that sat in the water out there. As long as that rock sits there, your rights would not be discussed in any way in the future. So once the people were told that and they were affirmed that the government was sure on their word, then the people decided to go with the treaties.
>
> The documents were to last forever according to the sun. The sun still shines today, there's still water today, the rivers flow, and that rock is still sitting out in the lake at Brochet.[76]
>
> -- Louis Benoanie

> The treaty commissioners came in, the priest was interpreting. And what the priest said was that if you take this money here, even though you're taking the money, your rights, whatever how you use the land, would not be questioned in the future.
>
> The money is just basically an understanding between us and the government on how we could use the land. That's what it was all about. So when we were affirmed of that about five days into the negotiations, that was the government position, then the people were assured that their rights would not be tampered with in any way, that they decided to go along with the treaties.
>
> So the negotiations, from what I heard, went on for about five days, like I just said. The treaty commissioner said that as long as there's water down there on the shore or out on the lake, as long as the sun shines, as long as the rocks do not move, these rights would last forever because what they agreed to with us was meant to last forever.[77]
>
> -- Jimmy Dzeylion

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[76] ICC Transcript, vol. 1, pp. 16-17 (Louis Benoanie).

[77] Ibid., vol. 1, pp. 42-43 (Jimmy Dzeylion).

> [T]he treaty negotiations must have went on for about a week, then just near the end of the negotiations, it was hard to determine which way the people would go. There was, I guess, great hesitation to go along with it . . .
>
> So the treaty commissioner said to the people that these rights that you're talking about, you would be able to retain those rights into the future as long as there's a rock out there, as long as there's water and the sun shines that your rights would be protected as long as that. That's what my mother said. That's what she said that the treaty commissioner had told the people.[78]
>
> -- Bart Dzeylion

POST-TREATY CONDUCT OF THE PARTIES

The Regulation of Hunting and Trapping

The Denesųłiné changed their traditional way of life little after their adherence to Treaties 8 and 10. They continue to live as and where they had before and they continue to hunt, fish, and trap throughout their traditional territory.

Beginning in the 1920s, hunting and trapping regulations were enacted and enforced in Saskatchewan and the Northwest Territories. These regulatory regimes were established by the provincial and territorial jurisdictions. The evidence before us establishes that they occasioned confusion and dismay among the Denesųłiné, who were accustomed to exercising their harvesting rights without any interference from government institutions.[79]

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[78] ICC Transcript, vol. 1, pp. 55-57 (Bart Dzeylion).

[79] Indian Agent G. Card to Department of Indian Affairs, July 17, 1922, NA, RG 10, vol. 6921, file 779/28-3, part 2 (ICC Documents, p. 458). Also see Indian Agent's Report on Annuity Payments, completed by Gerald Card, August 1, 1927, NA, RG 10, vol. 6921, file 779/28-3, part 2 (ICC Documents, p. 492).

During the 1920s the Northwest Territories administration, the Royal Canadian Mounted Police, and officials within the Department of Indian Affairs had discussions about how best to "license" those Indians living within Saskatchewan south of 60° latitude for hunting in the Northwest Territories.[80] Eventually, on October 15, 1927, the decision was made by the Director of the Northwest Territories and Yukon to allow the Denesųłiné to hunt and trap in the Northwest Territories without having to pay for a non-resident game licence.[81]

In the late 1940s the implementation of registered traplines for both groups and individuals in the Northwest Territories became a serious topic for discussion among federal and territorial government officials.[82] Eventually, in 1949, the Superintendent for Indian Affairs met with trappers from Fond du Lac and Stony Rapids to identify their traplines on maps for the purposes of registering the group traplines of the Bands.[83] These traplines were eventually registered in the Northwest Territories in 1951.[84] It was clear at this time that many of the traplines of the Denesųłiné people were situated north of the 60th parallel and outside the treaty boundaries.[85]

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[80] Director O.S. Finnie, Department of Interior, to J.D. McLean, Indian Affairs, March 10, 1924, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 464); Inspector H.L. Fraser, RCMP, to Commanding Officer Edmonton, July 14, 1925, NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 466); O.S. Finnie to J.D. McLean, August 15, 1925: "Even if Mr. Card is correct in considering that the Treaty can be so construed as to give Indians from another part of Canada the right to enter the North West Territories and hunt in contravention of a game regulation, he would hardly state that such action can be taken against the provisions of the North West Game Act itself," NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 467); O.S. Finnie to T.R.E. McInnes, August 22, 1925, NA, RG 10, vol. 4049, file 361,714 (ICC Documents, p. 469); Cortlandt Starnes to D.C. Scott, August 27, 1926, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 470). Also see Starnes to Director, North West Territories & Yukon, Department of Interior, August 27, 1926, NA, RG 10, vol. 6742, file 420-6-1 (ICC Documents, p. 486); O.S. Finnie to D.C. Scott, October 15, 1927, NA, RG 10, vol. 6742, file 420-6-2 (ICC Documents, p. 493).

[81] O.S. Finnie to D.C. Scott, May 1, 1928, and May 25, 1928, NA, RG 10, vol. 6742, file 420-6-2 (ICC Documents, pp. 495-97), and R.A. Gibson, Deputy Commissioner for Administration of the Northwest Territories, to Dr. H.W. McGill, Director, Indian Affairs, July 18, 1938, NA, RG 10, vol. 6744, file 420-6-5 (ICC Documents, p. 514), confirm the view that Indians and half-breeds who did not reside near the NWT border were not allowed to avail themselves of the 1927 ruling which excepted the Denesųłiné.

[82] R.A. Hoey to R.A. Gibson, Director, Lands & Development Services, August 12, 1948, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 545); R.A. Gibson to R.A. Hoey, August 20, 1948, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 544).

During the 1960s the government implemented a number of conservation measures to try to preserve the caribou herds.[86] The historical record shows that the Department of Indian Affairs was concerned about the deleterious effect which the curtailment of caribou hunting would have on the Dene. There were discussions among department personnel with respect to economic opportunities for those people.[87] Generally speaking, these discussions were directed towards development of a management program for the Fond du Lac and Stony Rapids Bands in such areas as tourism, camp trade, and fishing, as well as the continuation of hunting, fishing, and trapping in the Northwest Territories.[88]

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[83] J.W. Stewart, Superintendent, Athabasca Agency, to G. H. Gooderham, Regional Supervisor of Indian Agencies, January 7, 1950, NA, RG 10, vol. 6742, file 420-6-1-1 (ICC Documents, p. 554).

[84] Jean Lesage, Minister, Northern Affairs and National Resources, to John H. Harrison, MP, July 24, 1956, NA, RG 10, vol. 483, file 40-6-1, part 2 (ICC Documents, p. 566).

[85] ICC, Exhibit 13.

[86] J.G. McGilp, Regional Supervisor, Mackenzie District, Department of Indian Affairs, memorandum to Indian Affairs Branch, Ottawa, October 24, 1960, NA, RG 10, vol. 8862, file 1/18-11-6, part 3 (ICC Documents, p. 586).

[87] N.J. McLeod, Regional Supervisor (Saskatchewan), Department of Indian Affairs, to J.G. McGilp, Regional Supervisor, Indian Agencies, Fort Smith, August 17, 1961, NA, RG 10, vol. 8406, file 601/20-10, part 1 (ICC Documents, p. 587); N.J. McLeod, Regional Supervisor of Indian Agencies (Saskatchewan), in memorandum to Indian Affairs Branch, Ottawa, August 22, 1961, NA, RG 10, vol. 8406, file 601/20-10 (ICC Documents p. 589); R.F. Battle, Chief, Economic Development Branch, Indian Affairs, to Regional Supervisor, Saskatchewan, August 19, 1961, NA, RG 10, vol. 8406, file 601/20-10, part 1 (ICC Documents, p. 596); H.M. Jones, Director, Indian Affairs, to W.J. Brennan, Acting Regional Supervisor of Indian Agencies, Saskatchewan, June 5, 1962 [no file reference available] (ICC Documents, p. 601).

[88] J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to N.K. Ogden, Superintendent, Meadow Lake Agency, September 5, 1962, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 606); Jules D'Astous, Chief, Economic Development Division, Indian Affairs, to

A letter written by the Assistant Deputy Minister for Indian Affairs, R.F. Battle, to Commissioner B.G. Sivertz of the Northwest Territories Council on August 3, 1965, summarizes usefully the federal government's understanding at that time of the circumstances of the Denesųłiné. At issue was whether the Denesųłiné at Fond du Lac and Stony Rapids would qualify for the $40 wolf bounty offered by the Northwest Territories government.[89]

> I have been advised that Indian trappers from Fond-du-Lac and Stony Rapids who trap, hunt and fish in the Northwest Territories will not qualify for the recently announced wolf bounty on the grounds that they are not bona fide residents of the Northwest Territories. While I can appreciate your position on the matter, I find it difficult to accept this reason.
>
> These Indians are occupying their traditional hunting grounds which they occupied long before the Saskatchewan boundary was established. Geographic and economic conditions have made it necessary for these people to trade in northern Saskatchewan because stores, schools and administrative centres have not been established within their hunting areas in the Northwest Territories. The trappers concerned hold valid and subsisting resident hunting licences for the Northwest Territories and royalty is paid on the fur which they harvest. They have always been recognized, for hunting purposes, as residents of the Northwest Territories and most of them maintain winter homes in the area.
>
> A parallel to this exists where Indians from Seven Islands, Quebec have traditionally hunted in Labrador. The Government of Newfoundland has extended full resident privileges to the Indians concerned including permits to take caribou, fur and game normally restricted to local residents. Indians from Manitoba, whose trapping grounds extend into Ontario, are also afforded full resident privileges and are serviced each year by Ontario Game Branch officials who visit

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Regional Supervisor of Indian Agencies, Saskatchewan, November 9, 1962, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 617).

[89] R.T. Smith, Superintendent, Meadow Lake Agency, Department of Indian Affairs, to Regional Supervisor of Indian Agencies, Saskatchewan, June 23, 1965, DIAND file 601/20-10, vol. 2 (ICC Documents, p. 642).

the settlements of Island Lake, Red Sucker Lake and Shamattawa in Manitoba.[90]

The Border A licensing system was introduced by the NWT government in 1984. Counsel for Canada provided the following summary of the territorial enactments:

> S. 11(1) of the regulations allows the Superintendent of Wildlife to issue Border A licences to an applicant who "resides in the northern half of Saskatchewan and Manitoba" and depends on, or has depended in the past, on hunting in the Territories "as a means of livelihood," if that person was either a holder of a general licence prior to 1979 or, establishes his or her eligibility to the satisfaction of the Superintendent. The holder of a Border A licence may hunt game only in that area of the Territories as set out in the Schedule to the regulations.[91]

The area in which Border A licence holders are entitled to hunt is depicted in Map 2. It would appear that this area corresponds generally with lands used by the Denesųłiné in the Northwest Territories.[92]

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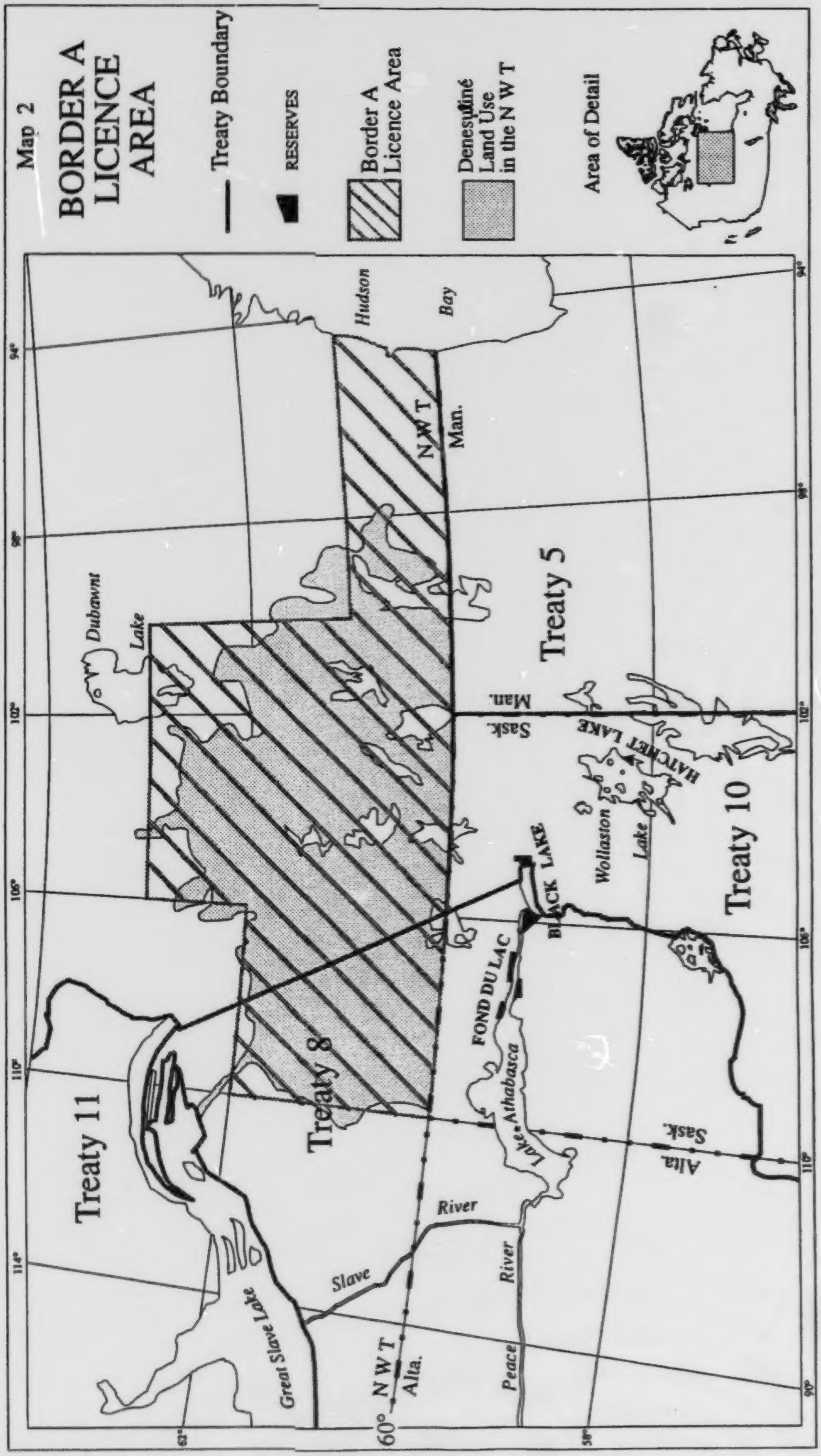
[90] R.F. Battle to B.G. Sivertz, August 3, 1965, DIAND file 601/20-10, vol. 2 (ICC Documents, pp. 644-45). The practice of offering wolf bounties was introduced as a conservation measure to protect caribou herds from being depleted by this predator.

[91] Submissions on Behalf of the Government of Canada, pp. 25-26.

[92] Counsel for the claimants tendered a map in evidence which showed the Border A licensing area in relation to the "recent and current land use area" of the Denesųłiné in the NWT (ICC Exhibit 13). This map was based on a land-use study conducted by Peter Usher in 1989 (ICC Affidavits, Tab A, p. 218).


Map 2
BORDER A LICENCE AREA
Treaty Boundary
RESERVES
Border A Licence Area
Denesųłiné Land Use in the N W T
Area of Detail
Hudson Bay
Dubawnt Lake
N W T
Man.
Sask.
Alta.
Treaty 5
Treaty 8
Treaty 10
Treaty 11
HATCHET LAKE
Wollaston Lake
BLACK LAKE
FOND DU LAC
Lake Athabasca
Great Slave Lake
Slave River
Peace River
60°
62°
58°
94°
98°
102°
106°
110°
114°

The Creation of Reserves

In the 1930s, government officials began to discuss the possibility of setting aside reserves for the Denesųłiné Bands. The creation of reserves was, however, complicated by the fact that the Denesųłiné spent much of their time hunting and trapping in the Northwest Territories. It is clear from the historical record that this reality was recognized by government officials at the time. In 1935 the Indian agent, H.W. Lewis, commented on how the people of Maurice's Band at Fond du Lac made their living:

> These Indians trap almost altogether in the Barrens and live in tents. Their food is largely fish and wild game. They do not have much contact with others, coming to the Trading posts at Treaty time and at New Years.[93]

The 1938 report of the Indian agent contains the following notations on Maurice's Band:

> Nomads. No Reserve. Living in Northern Saskatchewan and the N.W.T.
>
> . . .
>
> Maurice Band, Fond du Lac & Stony Rapids. The Indians in this area are demanding a restricted area with the base on the 59th parallel and extending across the whole of the northern part of Saskatchewan. I do not hold with this although a small area might be considered. The majority of these Indians are N.W.T. Indians and do most of their trapping in that area.[94]

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[93] Harry W. Lewis to the Secretary, Department of Indian Affairs, August 6, 1935, NA, RG 10, vol. 6921, file 779/28-3, part 3 (ICC Documents, p. 512).

[94] P.W. Head, Indian Agent, to H.W. McGill, Director, Indian Affairs Branch, August 25, 1938, NA, RG 10, vol. 6921, file 779/28-3 (ICC Documents, pp. 517, 519, and 521).

In 1944 the Indian agent reported that:

> The chief [of Fond du Lac] stated that his band was anxious to have an area in northeastern Saskatchewan and the Northwest Territories set aside for their exclusive use which is bounded roughly by the 59° parallel of latitude on the south, the 108° longitude on the west and extending northward to the Thelon Game Sanctuary in the N.W.T. This area has been under consideration for some years as a trapping preserve for the Maurice Band, and I would recommend that the province be consulted on this matter.[95]

The possibility of creating reserves for the Denesųłiné was revisited in 1952, 1956, and again in the early 1960s.[96] On January 11, 1960, the Department of Indian Affairs acknowledged an outstanding treaty land entitlement to the Denesųłiné Bands.[97] In the years that followed, land selections were made by the Denesųłiné Bands, including the claimants. It is important to note that even at this time, in the early to mid 1960s, "the Chief of the Stony Rapid Bands" sought assurances that his people would not be confined to reserves but would retain the right to travel, hunt, trap, and fish as before.[98] In a letter dated October 30, 1964, Mr. J.G. McGilp, the Regional Supervisor for Saskatchewan, Indian Affairs, provided the following assurance to Chief Louis Chicken of the Stony Rapids Band:

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[95] Memorandum from J.L. Grew to the Director of Indian Affairs Branch, August 26, 1944, NA, RG 10, vol. 6922, file 779/28-3, part 6 (ICC Documents, p. 539).

[96] G.H. Gooderham, Regional Supervisor of Indian Agencies, to J.W. Stewart, Superintendent, Athabasca Agency, November 12, 1952, DIAND file E-5673-06501, vol. 1 (ICC Documents, p. 562); Jean Lesage, Minister, Northern Affairs and National Resources, to John H. Harrison, MP, July 24, 1956, NA, RG 22, vol. 483, file 40-6-1, part 2 (ICC Documents, p. 566); also see the letter of N.J. McLeod, Regional Supervisor, Indian Affairs, to W.H. Antag, Assistant Indian Agent, Stony Rapids, Saskatchewan, November 25, 1959, NA, RG 10, vol. 6971, file 671/20-2, part 1 (ICC Documents, pp. 577-79), which confirms that many families from Fond du Lac had built cabins at Taltson River and Damant Lake for the winter and intended to establish a permanent residence in the NWT, on the condition that a trading post was established in the area.

[97] N.J. McLeod, Regional Supervisor of Indian Agencies, Saskatchewan, to Chief, Reserves & Trusts, Department of Indian Affairs, February 26, 1960, DIAND file 601/30-1, vol. 2 (ICC Documents, p. 581).

> In accordance with your request, I am writing once more to assure you that the movements of the people of the Stony Rapids Band of Indians will not be restricted in any way by the reserve lands being set aside for you.
>
> You and your people continue to have the same rights to camp, live, hunt, fish, trap, and travel as you did before your reserve lands were set aside.[99]

Federal Position on Harvesting Rights

On June 8, 1989, John F. Leslie, chief of the Treaties and Historical Research Centre for the Department of Indian Affairs, wrote to Ralph Abramson, Treaty and Aboriginal Rights Research - Manitoba, to inform him that the federal government was taking the position that the Denesųłiné harvesting rights in the Northwest Territories had been extinguished by the blanket extinguishment clauses in the treaties.[100] Based on the evidence before the Commission, this letter represents the first mention by the Government of Canada to the Denesųłiné that the harvesting rights of the Denesųłiné in the Northwest Territories are not protected by the terms of Treaties 8 and 10.

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[98] R.T. Smith, Superintendent, Meadow Lake Agency, Department of Indian Affairs, to Regional Supervisor of Indian Agencies, Saskatchewan, DIAND file E-5673-06538, vol. 1 (ICC Documents, p. 623); Stony Rapids Band Council, Saskatchewan, to Indian Affairs, Ottawa, August 20, 1964 [no file reference available] (ICC Documents, p. 625); J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to Indian Affairs, Ottawa, August 25, 1964 [no file reference available] (ICC Documents, p. 627).

[99] J.G. McGilp, Regional Supervisor of Indian Agencies, Saskatchewan, to Chief Louis Chicken, Stony Rapids Band, October 30, 1964, DIAND file E5673-06538 (ICC Documents, p. 635).

[100] Letter from John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, TARR, Manitoba, dated June 8, 1989 (ICC Exhibit 3).

PART V

ANALYSIS AND CONCLUSIONS

PRINCIPLES OF TREATY INTERPRETATION

The issues before this Commission involve the interpretation of Treaties 8 and 10. Before considering the substantive arguments on the question of whether Canada owes an outstanding lawful obligation to the Denesųłiné, we will outline the analytical framework we have adopted in the interpretation of Treaties 8 and 10.

Counsel for the parties referred to a number of authorities on the principles of interpretation for Indian treaties and dedicated a substantial amount of time and effort to arguments on this subject. In the Commission's report into the Primrose Lake Air Weapons Range Inquiry, the panel members concluded that, as we are not a court of law, this Commission is not bound exclusively by the principles of treaty interpretation that have been developed by the courts.[101] Our mandate, which is found in Order in Council PC 1991-1329 as amended by PC 1992-1730, directs us to inquire into land claims, using as a basis the Specific Claims Policy, *Outstanding Business.* As a result, and as we said in the Primrose Lake claim, rules of evidence must be considered with all other evidence as prescribed by the Policy. Nevertheless, the parties made extensive arguments on the case law in support of their positions on the appropriate methodology to be adopted in the interpretation of the treaties. In the following analysis we shall consider the legal authorities in the context of their consistency with the rules, intent, and purpose established by the Specific Claims Policy.

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[101] ICC, "Primrose Lake Air Weapons Range Report," pp. 192-96.

The Specific Claims Policy

In the Primrose Lake Report, the Commission concluded that we are directed to follow the guidelines of the Specific Claims Policy in the course of making our deliberations and findings on the merits of a claim rejected by the federal government. Guideline 6 relating to the "submission and assessment of specific claims" states that:

> All relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law.[101]

This guideline clearly provides that all relevant historical evidence, irrespective of admissibility in a court of law, must be taken into account in determining whether a First Nation has submitted a valid claim for negotiation. The Policy states that the guidelines "form an integral part of the Government's policy on specific claims."[102] The Policy also provides that claims will not be rejected "because of the technicalities provided under the statutes of limitation or under the doctrine of laches."[103]

Outstanding Business states that:

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary. Negotiation, however, remains the preferred means of settlement by the government, just as it has

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[101] *Outstanding Business*, p. 30.

[102] Ibid., p. 29.

[103] Ibid., p. 21.

> been generally preferred by Indian claimants. In order to make this process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[104]

It is clear that one of the central purposes of the Policy is to offer a viable alternative to the courts. The Policy therefore ensures that the resolution of outstanding specific claims will not be frustrated by the strict application of technical rules of evidence.[105]

When a First Nation submits a specific claim to the government, the Department of Indian Affairs is directed by the Policy to consider all relevant historical evidence in assessing whether it is a valid claim for negotiation. The Policy does not state any exceptions to this general principle. In our view, the objectives of the Policy would be seriously undermined if common law rules on the admissibility of evidence were adopted in the assessment of claims. Incorporating technical rules of evidence into the claims policy and review process would simply duplicate the evidentiary difficulties First Nations face in the courts -- one of the barriers the Policy was designed to eliminate.

The Policy states that the Department of Justice shall determine whether a First Nation's claim discloses an outstanding lawful obligation by considering all "pertinent facts and documents" provided to the department by the Specific Claims Branch.[106] In its legal review of specific claims submissions, the Department of Justice is likewise obliged to consider all relevant historical evidence, including evidence that would otherwise be considered inadmissible in a court of law.

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[104] *Outstanding Business*, p. 19.

[105] Ibid., p. 30.

[106] Ibid., p. 23.

In light of the foregoing, we have considered all relevant historical evidence in reaching our findings on the proper interpretation of Treaties 8 and 10. The procedures adopted at the community sessions were designed to ensure that the oral traditions of the Denesųłiné people were respected and taken into account in interpreting the treaties they signed with the Crown. We find that this approach regarding the assessment of claims is required by the Policy.

During the oral submissions, counsel for both Canada and the claimants acknowledged that guideline 6 of the Policy instructs the Department of Indian Affairs, the Department of Justice, and this Commission to consider all relevant historical evidence in determining whether the Denesųłiné's claim discloses an outstanding lawful obligation.[107] However, the manner in which Canada wishes to apply this guideline raises some concerns in our minds.

Canada maintains it has taken all relevant evidence into account in its interpretation of Treaties 8 and 10. However, counsel for Canada submit that where the written terms of a treaty are not ambiguous they should be relied on as "the best evidence we have of the intention of the parties."[108] In effect, counsel for Canada submit that the intentions of the parties to Treaties 8 and 10 are clearly expressed in the written treaties and, accordingly, little or no consideration should be given to the Treaty Commissioners' oral promises and guarantees or to other forms of evidence.[109]

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[107] ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, p. 140 (Mr. Daigle).

[108] Ibid., pp. 139-40 (Mr. Daigle).

[109] When Treaties 8 and 10 were negotiated, the Government of Canada appointed Treaty Commissioners to act as their agents in the negotiations with the Indians.

The approach Canada takes regarding "best evidence" is one this Commission has commented upon before and one we find disconcerting.[110] As we have stated on several occasions, the Policy requires that all relevant evidence submitted in support of a specific claim must be admitted and assessed. Again, this is not only the prescribed approach for this Commission, but also for the Specific Claims Branch and the Department of Justice. We agree with the submission of counsel for Canada when they say:

> In assessing this claim, Canada will consider the evidence and legal arguments submitted by the claimants and determine whether the claim discloses an outstanding "lawful obligation, i.e., an obligation derived from the law on the part of the federal government." This assessment will consider not only the applicable law, but also, as provided by criterion 6 at page 30 of the Policy "all relevant historic evidence . . . and not only evidence which, under strict legal rules, would be admissible in a court of law."[111]

Accordingly, we have followed this rule of assessment in this claim.

In reaching our findings and conclusions, we have, as required by the law and *Outstanding Business*, reviewed the treaties themselves and given appropriate weight to the promises and guarantees of the Treaty Commissioners. We have also examined the historical documentation, listened to the arguments of all counsel, and considered the oral testimony of the Denesųłiné elders and Band members, based primarily as it is upon knowledge passed down from generation to generation.

We would note in closing that we have carefully considered the arguments submitted by the parties with respect to the principles of law that apply in a court of law concerning the use of extrinsic evidence as an aid to the interpretation of treaties. However, in our view, Treaties 8 and 10 are ambiguous in describing the geographical boundaries that pertain to the harvesting rights clause. In such cases the law of Canada is clear: extrinsic evidence is to be considered. Thus we would reach the same conclusions based upon the legal principles.

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[110] See ICC, "Primrose Lake Air Weapons Range Report," pp. 191-96.

[111] ICC, Submissions on Behalf of the Government of Canada, p. 14.

ISSUE 1: THE GEOGRAPHICAL SCOPE OF TREATIES 8 AND 10

> 1 Does the geographical scope of Treaties 8 and 10 extend north of the 60° latitude or is it limited to the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

The claimants assert that the boundaries of Treaties 8 and 10 extend beyond the metes and bounds descriptions in each of those treaties to include the traditional lands of the Denesųłiné north of 60° latitude. It is their submission that:

> The Denesuline submit that the treaty boundaries of Treaties 8 and 10 are not as described in the written versions of those treaties. On the contrary, Treaties 8 and 10 extend beyond those written boundary descriptions to cover the traditional lands of the Denesuline. The evidence of the Denesuline's relationship with the land and of what occurred at the time the treaties were made supports this conclusion, as does the evidence of the parties' conduct after the treaties were made.[112]

Counsel for Canada, on the other hand, submit that the metes and bounds descriptions in the treaties correctly describe the geographical scope of Treaties 8 and 10. They say that:

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[112] ICC, Submissions on Behalf of the Claimants, p. 10.

> [A]fter considering *all the evidence relevant to the issue of boundaries*, including the metes and bounds description in each of the treaties, the most reasonable interpretation is that the treaty area is limited to the metes and bounds description in Treaty 8 and 10.[113]

Notwithstanding the express metes and bounds description in the treaties, the claimants submit that the parties intended the Denesųłiné's traditional lands north of 60° latitude to be included within the treaty boundaries.[114] This, they say, is the conclusion to be reached when consideration is given to: "evidence of the Denesųłinés' relationship with the land," and "the knowledge of the parties at the time the treaties were made, the representations made by the parties and [their] subsequent conduct."[115]

The evidence, as set out at pages 20 to 23 and again at pages 31 to 33, demonstrates that the primary object and purpose of the treaties, from Canada's perspective, was to obtain a surrender over certain specified tracts of land as defined by the metes and bounds descriptions in the treaties. Indeed, the treaties themselves make it clear that Canada's purpose was to get a surrender of specific territory to accommodate non-Indian settlement, as well as such things as trade, mining, and lumbering.

We agree with Canada's submission on this point:

> With respect to Treaty 8, it is clear from the Orders in Council empowering the Treaty 8 Commissioners, and from reports prepared by Dennis F.K. Madill for DIAND and by Gloria Fedirchuk and

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[113] ICC, Submissions on Behalf of the Government of Canada, p. 26. Emphasis added.

[114] ICC, Submissions on Behalf of the Claimants, p. 11, para. 34.

[115] Ibid., pp. 9-10, para. 29 and para. 36.

Edward McCullough for the Commission, that the government's intention at the time of Treaty was to acquire ownership of a specifically bounded tract of land. The reasons underlying the delineation of Treaty 8 lands are summarized in Fedirchuk's report at pages 51 and 52:

> "The boundaries of Treaty 8 were determined largely on the basis of the location and potential intensity of mining, the routes of prospector/miner traffic into this vast area, and the necessity of achieving and maintaining amicable relations with the native inhabitants as well as "minimizing expenses and obligations of the government restricting the area that might be reached in one summer by the commissioners."

With respect to Treaty 10, three sides of the lands incorporated in that Treaty were set by the boundaries of earlier treaties. Fedirchuk states at page 63 that:

> "Unlike previous treaties, the lands identified in Treaty 10 were delineated for purely political reasons as they 'cleared title in the newly formed provinces of Saskatchewan and Alberta.'"

As in the case of Treaty 8, the Order in Council empowering the Commission for Treaty 10 instructs the Commissioner to acquire ownership of a specific tract of land.[116]

We find that the evidence in this matter demonstrates that Canada knew that the Denesųłiné occupied, hunted, trapped, and fished much of the time north of 60° latitude.

It was to this end that the Denesųłiné sought, and believed they obtained, guarantees and promises from Treaty Commissioners and senior government officials to the effect that their *traditional lifestyle* based on hunting, fishing, and trapping would be protected by the treaties. This is admitted by Canada.

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[116] ICC, Submissions on Behalf of the Government of Canada, p. 22.

We are unable to find that the evidence supports the claimants' argument. Indeed, counsel for the claimants were unable to point to any evidence that would put the boundaries anywhere other than as described in the treaties.

The parties agree that the traditional territory of the claimants was not delineated at the time the treaties were negotiated and signed and, for the most part, remains undelineated to this day.

In our view, the Denesųłiné were aware of Canada's intention to acquire specific tracts of land. The Denesųłiné's traditional lands outside the boundaries described in Treaties 8 and 10 were not intended, at the time the Treaties were negotiated and signed, to be "opened"[117] for non-Indian settlement, mining, lumbering, and the like. We are unable to agree with the claimants that "the boundaries of Treaties 8 and 10 are not as described in the written versions of those treaties."[118]As a result of the foregoing, we find that there was no intention on the part of the parties to include the Denesųłiné traditional lands north of 60° in the boundaries of the treaties.

ISSUE 2: HARVESTING RIGHTS BEYOND THE BOUNDARIES OF THE TREATIES

> 2 In the alternative, do the claimants have a treaty right to "pursue their usual vocations of hunting, trapping and fishing" beyond the territory as described in paragraph 6 of the written text of Treaty 8 and paragraph 8 of the written text of Treaty 10?

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[117] Excerpt taken from the *Whereas* clauses in *Treaty No. 8*, p. 11 (ICC Documents, p. 354), and *Treaty No. 10*, p. 10 (ICC Documents p. 435).

[118] ICC, Submission on Behalf of the Claimants, p. 9.

The claimants submit that if this Commission finds, as we have done, that the boundaries of Treaties 8 and 10 are as described in the text of the treaties, we should consider an alternative argument. They contend that:

> The Denesuline possess treaty rights, extending beyond the borders of the treaties, in respect of their traditional lands.[119]

These rights include those lands north of the 60th parallel, the subject matter of this inquiry.

Canada, in response, says:

> [T]he treaty right to hunt, fish, and trap extends only to the lands within the metes and bounds description in each treaty.[120]

In dealing with this issue, we will consider all historical evidence, including the treaties, as well as the submissions of counsel. To that end we now turn to an examination of the treaties, followed by an analysis of the historical evidence. The relevant historical evidence may be divided into two categories: 1) conduct of the parties leading up to and during the signing of the treaties; and 2) conduct of the parties after the treaties were signed.

The Text of the Treaties

As set out previously, Treaties 8 and 10 are essentially identical in construction and wording. For ease of reference, we have set out below and will examine only the relevant paragraphs of Treaty 8. In the interests of clarity, we will refer to the following six clauses as:

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[119] ICC Submission on Behalf of the Claimants, p. 38, para. 96.

[120] ICC, Submissions on Behalf of the Government of Canada, p. 26.

1 Purpose preamble;

2 Surrender clause;

3 Metes and Bounds description;

4 Blanket Extinguishment clause;

5 Grant to the Crown; and

6 Harvesting Rights clause.

• • •

1 AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open up for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem to meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

2 AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say. -

3 Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the

> Rocky Mountains . . . and along the said boundary easterly, northerly and southwesterly, to the place of commencement.
>
> 4 AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia or in any other portion of the Dominion of Canada.
>
> 5 TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.
>
> 6 And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the *tract surrendered as heretofore described*, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[121]

The question to consider in this matter lies in determining what geographical scope the parties intended for the application of the Harvesting Rights clause. In particular, the question is whether the words "tract surrendered as heretofore described" were intended to include only those lands described by the Metes and Bounds description in clause 2, or were intended also to include lands surrendered pursuant to the Blanket Extinguishment clause?

Counsel for Canada submit the correct interpretation of the Harvesting Rights clause is that the words "tract surrendered" are expressly modified by the words "as heretofore described." We agree. However, the question is what lands are included within the phrase "as hereinafter described." Canada argues that the phrase must refer back to the Metes and Bounds description. In support of this contention Canada emphasizes the Purpose preamble, which refers to "a tract of country bounded and described as hereinafter mentioned." Counsel for Canada argue that the Purpose preamble contains the first reference to the term "tract." They say this term must be interpreted consistently in the treaty with reference to the use which is made of it in the Purpose preamble, namely, the reference to "a tract of country bounded and described." Canada's argument continues that the harvesting rights of the Denesųłiné on these lands were to be affected as settlement occurred and as other purposes were fulfilled. As a result, Canada says, as settlement is confined to the metes and bounds lands, so are the harvesting rights of the Denesųłiné.

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[121] *Treaty No. 8*, p. 12 (ICC Documents, p. 355), and *Treaty No. 10*, pp. 10-11 (ICC Documents, pp. 435-36). Clause numbers and emphasis added.

The claimants, on the other hand, submit that the words "tract surrendered as heretofore described" in the Harvesting Rights clause refer to both those lands surrendered under the Metes and Bounds clause and those lands surrendered under the Blanket Extinguishment clause. Their argument appears to be based on two grammatical points.

First, they contend that in order to interpret the phrase "tract surrendered" properly, one must look to where the surrender takes place - in a grammatical sense. They argue that the "surrender" arises from the Surrender clause and not from the Metes and Bounds description. Therefore, they submit the subsequent reference must be to all the land surrendered by the Surrender clause.

Second, they argue that the proper grammatical construction of the treaty is that the Metes and Bounds description and the Blanket Extinguishment clause are both subparagraphs of the Surrender clause. This contention, they say, is supported by the sentence structure and grammar of the three clauses:

> ([I]n fact they are not proper sentences without one another - (a) [the Surrender clause] lacks an object, and (b) [the Metes and Bounds description] and (c) [the Blanket Extinguishment clause] lack a subject and a verb). Put another way, the main clause incorporates the surrender clauses by reference.[122]

Thus, claimants' counsel say, the Blanket Extinguishment clause is a part of the clause describing which lands are to be surrendered. Therefore the Harvesting Rights clause, which refers to the "tract surrendered," must by definition apply equally to both the specific and the blanket surrenders.

It is our view that the structure of these paragraphs in the treaties makes it clear that the reference in the Harvesting Rights clause to the "tract surrendered as heretofore described" applies to all lands surrendered by the Denesųłiné under the treaties. Although there is some merit in the submissions of Canada on this point, those arguments are not supported by either the grammar or the language of the treaties. Furthermore, the Surrender clause and the Blanket Extinguishment clause both state, in identical language, that the Indians are surrendering "all their rights, titles and privileges whatsoever" to the lands described in the Metes and Bounds clause and to "all other lands wherever situated."

In assessing the language of the treaties and in listening to the submissions of counsel, we find that the interpretation offered by Canada is not the preferred construction. We find that a reasonable interpretation of the written text of the treaties is that the right to hunt, fish, and trap was intended by the parties to apply to all the traditional lands of the Denesųłiné, regardless of whether they were located within the Metes and Bounds description of the treaty or whether they were lands surrendered under the Blanket Extinguishment clause. No distinction is made in the treaty Harvesting Rights clause between these lands.

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[122] ICC, Submissions on Behalf of the Claimants, p. 41, para. 102.

To agree with Canada would mean that, if settlement and other activities in the metes and bounds lands were someday to encompass all those lands, and if those same lands are the only lands where the Denesųłiné could exercise their harvesting rights, then the effect would be that the Denesųłiné would lose forever their means of livelihood, which was based on hunting, fishing, and trapping. In our view it is inconceivable that such a result was intended by Canada or that the Denesųłiné would have ever agreed to such a potentially devastating arrangement. This is clear from the historical evidence, to which we now turn.

The Relevant Historical Evidence[123]

We now consider this interpretation of the treaties in light of the historical evidence. We find them to be consistent. We will examine the evidence in two parts. First, we will consider the conduct and representations of the parties up to the negotiation and signing of the treaties. Second, we will examine the conduct of the parties after the treaties were concluded, up to the present.

We were advised at the outset of this inquiry that the factual question of whether or not the Denesųłiné carried out harvesting activities north of 60° latitude is not in dispute. At the commencement of this inquiry, counsel for this Commission set out the agreement as follows:

> [T]hrough the agreement of counsel on behalf of the government and for the Athabasca Denesuline, the issue of harvesting rights north of 60° is not in dispute. In other words . . . it will not be necessary (for the Commission) to inquire into how far beyond the boundary or the southern boundary of the Northwest Territories the Athabasca

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[123] The evidence before this inquiry has been more fully set out in Part II. This section is meant simply to highlight some of the more pertinent findings of fact.

> Denesuline have exercised their rights in the past. It is undisputed that there was significant use that it dates back into the mists of history and that it continues today.[124]

Conduct prior to the Treaties

We have reached the following conclusions based upon our review of the full body of historical evidence:

- Canada's objective was to secure a specific tract of land for settlement and other purposes.
- The objective of the Denesųłiné was to protect their traditional way of life.
- The Denesųłiné were extremely apprehensive about entering into treaties for fear that their traditional way of life, including hunting, fishing, and trapping, would be jeopardized.
- To assuage the concerns of the Denesųłiné, oral assurances were given by the Treaty Commissioners that the Denesųłiné would be "as free to hunt and fish, after the Treaty as if they had never entered into it."
- There is no cogent evidence that the Treaty Commissioners at any time told the Denesųłiné that their right to hunt, fish, and trap would be restricted to a specific geographical area.

The thrust of the Crown's argument is that the Denesųłiné deliberately gave up all of their traditional hunting, fishing, and trapping territory in return for the certainty of treaty harvesting rights within a smaller area, namely, the area defined in the Metes and Bounds description contained in the treaties.

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[124] ICC, Athabasca Denesuline Treaty Harvesting Rights Inquiry (transcript), May 10, 1993, p. 9 (Mr. William Henderson).

In our view this is not a reasonable construction of the evidence because the metes and bounds area is not only smaller than the full traditional land area, but it was not where they hunted caribou. It is unlikely that a people known as the "Caribou Eaters" would have agreed to this arrangement. In addition, we note that the metes and bounds area provided no real guarantee for the Denesųłiné since those lands were subject to the Crown's right to take them up for settlement and other purposes - to the exclusion of the Denesųłiné.

Taking into account all the evidence surrounding the negotiation of the treaties, and the adhesions to those treaties, we conclude that the parties did not intend to limit treaty harvesting rights to the lands described in the Metes and Bounds description in the treaties. No distinction was made between lands surrendered under the Metes and Bounds descriptions and lands surrendered under the Blanket Extinguishment clause for the purposes of defining the territorial scope of Indians' treaty harvesting rights.

Post-Treaty Conduct of the Parties

The parties accept that after the signing of Treaties 8 and 10, the Denesųłiné continued to hunt, fish, and trap throughout their traditional territories, including the lands north of 60°, as they had for many generations before the treaties were signed. The evidence also confirms that the Government of Canada knew at all times that the Denesųłiné continued to make their livelihood from the lands and resources north of the 60th parallel after the treaties were signed.[125]

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[125] For example, in 1935 the Indian Agent for Fond du Lac noted that the band "trap almost exclusively in the Barrens and live in tents. Their food is largely fish and wild game. They do not have much contact with others, coming to the Trading posts at Treaty time and at New Years." H.W. Lewis to Secretary, Indian Affairs, NA, RG 10, vol. 6921, file 779/28-3, part 3 (ICC Documents, p. 512).

Indeed, it is acknowledged by Canada that the claimants continue to this day to rely on those traditional lands for that purpose. Therefore, Canada submits:

> [T]he mere fact that the Claimants have continued their harvesting activities on their claimed traditional harvesting lands after the signing of the treaties does not mean that they have been carrying on those activities pursuant to any treaty right.[126]

Therefore, the issue for this Commission to consider is the *source* of the rights being exercised by the Denesųłiné.

Canada submits that harvesting activities are exercised pursuant to treaty rights when the harvesting occurs within those lands described by the Metes and Bounds description in the treaty, but that any harvesting rights being carried on outside that description are "rights" which "appear" to be "derived from federal or territorial legislation."[127]

The claimants say:

> In the present case, the evidence of [the] historical context is overwhelming: both the Treaty Commissioners and the Denesuline understood that the Denesuline would be entitled to exercise their treaty rights throughout all their traditional lands. The Claimants will not repeat the evidence discussed in Part II above, but all of that evidence applies equally to the present argument by demonstrating the mutual understanding of the parties that the Denesuline could continue to hunt, fish and trap as they always had.[128]

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[126] ICC, Submissions on Behalf of the Government of Canada, p. 26.

[127] Ibid., p. 26.

[128] ICC, Submissions on Behalf of the Claimants, p. 43, para. 107.

The claimants further submit that:

> Government records from prior to the commencement of this dispute disclose that Canada has consistently acknowledged the Treaty or aboriginal rights of the Denesuline/Chipewyan throughout their traditional lands, and has at various times encouraged and promoted their use of these areas north of the 60th parallel in the Northwest Territories.[129]

The evidence shows that after the establishment of provincial boundaries, regulatory regimes were introduced respecting game and fish. And, although these regulatory regimes tended to curtail the harvesting activities of the Denesųłiné, it is also clear from the historical record that the Department of Indian Affairs and other federal departments promoted and encouraged the claimants' harvesting activities in the Northwest Territories.

It is our view Canada's submissions that such regulatory schemes "conferred" hunting, fishing, and trapping privileges are not persuasive. In effect, Canada says that if the claimants had treaty rights, they would not have had to obtain licences as they did and as they continue to do pursuant to the "Boundary A Licensing Scheme" in place in the Northwest Territories. At the same time, the evidence shows that the same licensing requirements were imposed on those Indians within the Metes and Bounds description area set forth in Treaty 8, an area that extends well into the Northwest Territories (lands north of the 60th parallel). We fail to see how such a scheme, in the face of the evidence, supports Canada's submissions, and, accordingly, cannot agree with them.

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[129] Ibid., p. 30, para 81.

The Department of Indian Affairs was at all times aware that the Denesųłiné occupied, hunted, fished, and trapped north of the 60th parallel. We find no evidence to support the conclusion that Treaties 8 and 10 were interpreted by the officials of Canada to limit the treaty harvesting rights of the Denesųłiné to lands within the Metes and Bounds descriptions of the treaties. We are struck by the frequency with which the historical record shows the Government of Canada as recognizing those lands being used outside the treaties as the Denesųłiné's "traditional lands" or "territory" or "traditional hunting grounds." Canada now, in essence, asks us to give no significance to its repeated use of such terms. Counsel for Canada submit that there is nothing in the historical record to suggest that Canada either expressly or by implication acknowledged "treaty rights" in the Northwest Territories. Their submission is:

> While Canada may have encouraged and promoted the Denesuline harvesting activities in the NWT, Canada has never recognized, promoted or defended, as is alleged by the Claimants, any treaty rights to harvest outside of the metes and bounds descriptions in the treaties.[130]

With respect, we cannot completely agree with Canada's submission. The historical evidence demonstrates quite clearly that the Government of Canada, and the Department of Indian Affairs specifically, not only encouraged the Denesųłiné to use the claim area for years after the treaties were signed, but, whenever there were attempts to curtail the exercise of the Denesųłiné's harvesting activities, the Government of Canada, almost without exception, rose to defend their exercise of these rights. In its defence of the exercise of their rights, Canada referred to them as traditional rights. Canada held that any interference with those rights "contravenes the treaty."[131]

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[130] ICC, Submissions on Behalf of the Government of Canada, p. 24. Original emphasis.

It was not until June 8, 1989, that the Government of Canada took a different position. On this date the Department of Indian and Northern Affairs first informed the Denesųłiné that the Blanket Extinguishment clause was being interpreted to extinguish their harvesting rights outside the lands defined in the Metes and Bounds descriptions of the treaties.[132]

In our view, the subsequent conduct of the parties is not conclusive, but is consistent with the interpretation of the treaties we have adopted.

ISSUE 3: DOES CANADA HAVE A LAWFUL OBLIGATION?

3 Has Canada breached its lawful obligation to the claimants under the Specific Claims Policy by failing to recognize either that:
   - a) the geographical scope of the treaties extends north of 60° latitude; or that
   - b) the claimants have treaty harvesting rights north of 60° latitude?[133]

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[131] H.L. Fraser, RCMP, to Jas Ritchie, RCMP, July 14, 1925 [no file reference available] (ICC Documents, p. 466).

[132] ICC Affidavits, Tab B, Morrison's affidavit at para. 8.13 referring to a letter from John F. Leslie, Chief, Treaties and Historical Research Centre, Indian and Northern Affairs Canada, to Ralph Abramson, Director, TARR, Manitoba, which states that "the question as to whether Treaties 8 and 10 extinguished hunting rights north of 60° was submitted to Legal Services for review. This review, along with a separate historical inquiry, has now been completed. It is the conclusion of Legal Services that the Treaties did, indeed, extinguish the rights of the Indians concerned, north of the 60th parallel."

[133] See ICC, Submissions on Behalf of the Government of Canada, p. 14.

Having found previously under Issue 1 that the geographical scope of the treaties does not extend outside the Metes and Bounds description contained in the treaties, it follows that the answer to a) above must be no.

Having found previously under Issue 2 that the claimants do have treaty harvesting rights outside the Metes and Bounds description contained in the treaties north of 60° latitude, we now examine if the failure to recognize those rights by Canada can or should be redressed through the Specific Claims process.

Canada submits that what the claimants are seeking from this Commission is not a validation of any "specific claim" as prescribed in *Outstanding Business*, but rather a form of *declaratory relief*.[134] This, they say, takes the claimants' request outside the scope of the Policy "as it does not involve an *outstanding lawful obligation*."[135] The Policy, Canada submits, "envisions instead negotiating claims where . . . Canada may have breached a lawful obligation which it owes to an Indian Band resulting in some loss to that Band."[136]

As we follow Canada's argument, it submits that finding a breach of a lawful obligation does not in and of itself give rise to a specific claim as set out in *Outstanding Business*. There is, it says, the further and necessary requirement that compensation in the nature of "land and/or money" must be apparent.[137] Put another way, Canada submits that, even if this Commission were to find that Canada is in breach of a lawful obligation, the Specific Claims Policy cannot assist the claimants since money or land or both is not the requested (or actual) settlement result.[138]

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[134] See ICC, Submissions on Behalf of the Government of Canada, p. 9.

[135] See ibid., p. 7. Emphasis added.

[136] See ibid., p. 9.

[137] See ibid.

In summary, the Government of Canada submits that this Commission should find that the claim of the Denesųłiné is not a proper claim for negotiation pursuant to *Outstanding Business* for the following reasons:

> 1. The Policy requires that the Government of Canada must be in breach of a lawful obligation before a specific claim can be validated as a specific claim for negotiation.
>
> 2. Even if there is found to be a breach of a lawful obligation on the part of Canada, there must also be damages which can be quantified in either money or land or both.
>
> 3. The claim in issue here does not meet the requirements of either 1 or 2 above. The claimants are seeking *declaratory relief* under the Policy, which cannot be granted.

We propose to deal with each of the above submissions separately and in the order set out above.

Breach of a Lawful Obligation

We are of the view that most parties to the resolution of claims through the Government of Canada's Specific Claims Policy spend considerable time and attention on whether or not the government has "breached" some "lawful obligation." Canada's submissions respecting this particular claim demonstrate that it adheres to that line of thinking and analysis.

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[138] See ibid., p. 10. They say, "The Claimants have candidly admitted that this matter does not involve monetary loss." Further on they conclude that "[t]he claim of the Athabasca Denesuline is clearly one not contemplated by the Specific Claims Policy and consequently. . . cannot fall within the Commission's jurisdiction."

Remaining mindful the Policy must be read as a whole, we have undertaken a careful review of the literature, including *Outstanding Business*, related government publications, and counsels' submissions both written and oral. Having done so, we are unable to conclude that a "breach" of a lawful obligation is necessary in this case to establish a valid claim. The literature states that the "primary objective [of government] with respect to specific claims is to discharge its lawful obligation."[139]

More specifically, *Outstanding Business* states that:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.[140]

We are unable to find that in the case of "non-fulfillment of a treaty or agreement," the only time a claim may be considered for negotiation under the Policy is where the Government of Canada must first be in "breach" of a lawful obligation.[141]

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[139] *Outstanding Business*, p. 19.

[140] Ibid., p. 20.

[141] Although the *Federal Policy for Settlement of Native Claims*, p. 29, states that " [t]he Specific Claims Policy does not accept claims where actions have not been in breach of the federal government's lawful obligations."

The first step required by the Policy in this case is to determine whether Canada has an outstanding lawful obligation in the circumstances. We adopt the submission of the claimants:

> In order to establish a valid claim for negotiation under the Policy, the Claimants need to establish that Canada has an outstanding lawful obligation, which may arise from, among other things, the "non-fulfilment of a treaty agreement between Indians and the Crown."[142]

Both the claimants and Canada agree that the claimants are continuing their harvesting activities, although they are accepted by Canada as rights or privileges other than treaty rights.[143] The claimants submit that the failure to recognize the existence of a treaty right "must always amount to non-fulfilment of the treaty."[144]

We do not deem it necessary to examine in detail the emerging body of law and the constitutional protection afforded to the aboriginal and treaty rights of Indians.[145] We think it sufficient to say that such constitutionally protected rights now have a significant impact on, at least, government conduct and policy. Treaty rights of Indians entail a fiduciary obligation which, if breached, will give rise to government responsibility and obligation.[146]

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[142] ICC, Submissions on Behalf of the Claimants, p. 44, para. 114.

[143] ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, pp. 151-55.

[144] ICC, Submission on Behalf of the Claimants, p. 45, para. 115.

[145] See *Constitution Act*, 1982; *R. v. Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385, [1990] 3 CNLR 160.

[146] *Attorney General of Ontario v. Bear Island Foundation*, [1991] 2 SCR 570, 83 DLR (4th) 381, [1991] 3 CNLR 79. Both the Crown and the Court accepted that treaty obligations were fiduciary

As we have found under Issue 2, Canada has treaty obligations in the matter before us. Canada's lawful obligation surely must include, at a minimum, the requirement to recognize formally the treaty rights in issue, and to ensure that the rights of the Denesųłiné are fulfilled, or, perhaps more specifically, exercised within the protection afforded by the *Constitution Act* and the law.[147]

However, although it is necessary for a claimant to establish that Canada has an outstanding lawful obligation, that will not, in and of itself, necessarily mean that there is a valid claim for negotiation under the Policy. We turn then to the next issue.

Does the Policy Require Damages Compensable by Land or Money?

Outstanding Business throughout its text makes it clear that "the term 'specific claims' refers to claims made by Indians against the federal government which relate to . . . the fulfillment of Indian treaties."[148] The Policy document itself is divided into separate sections that direct Indian claimants first to a validation process, then to a settlement negotiation process.

> In order to assist Indian Bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the

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duties. Where the Crown failed to comply with some of the treaty obligations, the court held that "[the Crown] thereby breached its fiduciary obligations to the Indians."

[147] We believe that such a view is consistent with *Sparrow*, [1990], 1 SCR 1075 at 1105, where the court said: "s.35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights . . . Section 35(1), at least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against legislative power."

[148] *Outstanding Business*, pp. 3, 19, and 20.

> *submission and assessment* of specific claims and on the *treatment of compensation*. While the guidelines form an integral part of the government's policy on specific claims, they are set out separately in this section for ease of reference.[149]

Two separate sets of guidelines, entitled Submission and Assessment of Specific Claims and Compensation, follow the above statement. The submission guidelines consist of 10 rules, none of which stipulates or suggests that a band is required to show damages in the nature of financial loss or loss of land. The second set of guidelines respecting compensation commences as follows:

> The following criteria shall govern the determination of specific claims compensation:
>
> 1) As a *general rule*, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered . . . This compensation will be *based on legal principles*.[150]

In our view, the process, as contemplated by the Policy, does not require the claimant band to show damages in the nature of the loss of money, land, or both in order to have a valid claim. Indeed, this Commission has been established to consider and inquire into the matters of validation separate from the question of compensation.[151]

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[149] Ibid., p. 29. Emphasis added.

[150] *Outstanding Business*, p. 30. Emphasis added.

[151] Pursuant to Order in Council PC 1991-1329, July 15, 1991, the terms of reference of the Indian Claims Commission includes: " . . . inquire into and report on: a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; *and* b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria." Emphasis added.

Canada argues that the language of *Outstanding Business*, such as "the Minister . . . accepts . . . such claims as are eligible for negotiation," "the claim and the type of compensation being sought," and "the criteria for calculating compensation,"[152] demonstrates that the only claims which can fall within the Policy are those with:

> some kind of loss that is compensable, that can be calculated.[153]
>
> . . .
>
> The policy envisions . . . negotiating claims . . . resulting in some loss to that Band. The . . . Policy is designed to compensate a claimant through land and/or money.[154]

We cannot agree with Canada's submissions. It may well be the case that in most land claims, under the Policy, proper compensation will, of necessity, result in compensation in the form of money, land, or both, but in some claims the loss or damage may well be compensable by some other means.

The test is not whether there are damages compensable by land or money, but, rather, the test is that, to be eligible for negotiation, a claim must show *some loss or damage that is capable of being negotiated under the Policy.* Having found that Canada has an outstanding obligation to the claimants in this matter, we now examine whether the claimants have sustained a loss or damage that is capable of being negotiated under the Policy.

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[152] *Outstanding Business*, p. 24.

[153] ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, vol. 1, p. 120 (Mr. Daigle).

[154] ICC, Submissions on Behalf of the Government of Canada, p. 9.

We are not satisfied that negotiation pursuant to the Policy is a prescribed remedy in this matter given that the only substantiated complaint by the claimants in this process is that Canada refuses to *recognize* their Treaty rights north of 60° latitude. There is no evidence before this Commission that the claimants are being prevented from exercising their treaty harvesting rights.

We believe the phrase "acceptance of a claim for negotiation"[155] found throughout the Policy and supporting literature must mean something. After carefully reviewing the literature and listening to the submissions of counsel on this point, we believe that it means the loss or damage must be capable of being negotiated under the Policy. Currently the Policy and process are ill-equipped to deal with the Denesułiné's claim because, in the matter before us, there appears to be no loss or damage capable of being negotiated under the Policy.

Are the Claimants Seeking Declaratory Relief?

Canada submits that the claimants in this case are seeking a *declaration of rights*, which is not a remedy this Commission can grant.[156] As we follow Canada's argument at this time we are mindful of the fact that it is a return to the challenge first advanced prior to the commencement of this inquiry, heard by this Commission on May 6, 1993.[157] At that time we rejected Canada's challenge and concluded that this Commission was properly exercising its mandate. We then proceeded through our inquiry process. That decision is set out in full in Appendix A. We have not been convinced to alter our previous decision.

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[155] *Outstanding Business*, p. 30, and elsewhere in the Policy. The mandate of this Commission also states that we shall, by "considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon: (a) whether a claimant has *a valid claim for negotiation under the Policy* where that claim has already been rejected by the Minister." Emphasis added.

[156] See generally, ICC, Submissions on Behalf of the Government of Canada, pp. 6-11. Canada states that "the type of remedy which the claimants are seeking, being recognition of rights by a declaration, is not provided for in this forum."

[157] ICC, "Athabasca Denesuline Treaty Harvesting Inquiry, Ruling on Government of Canada Objection," May 6, 1993.

We would remind the parties that our mandate, as prescribed by our Orders in Council, includes to "inquire into and report on" and "to submit [our] findings and recommendations to the parties."[158] Declaratory relief is a judicial remedy that is binding on the parties, a relief we cannot grant. We cannot make binding decisions of that nature.

Canada accepts that the claimants are entitled to regard certain conduct of the federal government as a rejection of their claim.[159] The claimants have requested that this Commission inquire into the rejection of its claim by the Minister of Indian Affairs. Thus, the claimants are seeking precisely what this Commission has been charged with providing.

We agree with counsel for Canada in the following exchange:

> CHIEF COMMISSIONER: Are you telling us that if the Department of Indian Affairs rejects the claim on the basis that it is not a specific claim, that we don't have any capacity . . . to conduct an inquiry like we're doing here; just on the basis that you say it is not a specific claim, that by itself is sufficient to cause this Commission not to be able to conduct an inquiry?
>
> MR. DAIGLE: No, but what Canada would expect the Commission to do is to look at that claim and decide whether it has jurisdiction to inquire into it. And it would make the same assessment

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[158] See ICC Orders in Council.

[159] ICC Transcript, vol.1, p. 4.

> that Canada did when it first submitted to it; it would look at the Policy and see if that is a matter that the Policy was designed to handle."[160]

We think Mr. Daigle has captured the essence of our mandate.

Our recommendation with respect to submissions and arguments of this nature is that participants to the specific claims process should exercise caution lest they replace those technical arguments that have been rejected under this process, such as limitation periods, with what some might observe as even more technical nes. Justice and fairness will be better served if all parties to the process adhere to the spirit and intent of the Policy captured in *Outstanding Business:*

> In order to make [the negotiation] process easier, the government has now adopted a more liberal approach eliminating some of the existing barriers to negotiations.[161]

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[160] See, ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, pp. 12 and 13.

[161] *Outstanding Business*, p. 19.

PART VI

FINDINGS AND RECOMMENDATIONS

In Part V we dealt extensively with the principles of treaty interpretation applicable to claims submitted under the Policy. We noted that we are not a court of law and are not bound by principles of treaty interpretation developed by the courts. This is so because the Policy, in guideline 6, specifically rejects technical rules of admissibility with respect to historical evidence. Guideline 6 sets out that "all relevant historic evidence will be considered and not only evidence which, under strict legal rules, would be admissible in a court of law."

We note that the Department of Indian Affairs and Northern Development and the Department of Justice are bound by the Policy in assessing claims, as are we in conducting our inquiry.

Having noted that we are bound by the Policy to consider all relevant historical evidence, we also examined the case law argued by the parties. We concluded that the law would compel us to examine "extrinsic evidence" in this matter, as there is ambiguity on the face of the treaties.

We wish to pay particular attention to the meaning of guideline 6. We believe it was intended to do exactly what it says: *to require consideration of all relevant historical evidence when interpreting treaties bearing on specific claims.*

A word or phrase must be construed in the context of the document in which it occurs. It makes sense to read the terms of a treaty in light of the whole treaty, and in light of its historical context.

The objective of *Outstanding Business* is to provide an alternative to the law courts and to adopt "a more liberal approach eliminating some of the existing barriers to negotiations."[162] The government states that "its primary objective . . . is to discharge its lawful obligation as determined by the courts if necessary. However, negotiation remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants."[163] To facilitate the process of settlement by negotiation, the Policy provides a process under which claims may be brought and dealt with without resort to the courts.

It is wholly consistent with that objective for the government to free the process from the technical rules of evidence. That is hardly surprising, since the technical rules of evidence have led the courts to produce a number of complicated and contradictory decisions on the admissibility of extraneous evidence. In guideline 6, the government has sought to free the Office of Native Claims from having to struggle with this difficult area of law.

Since the Commission is directed by the Policy, we are obliged to consider the historical evidence in seeking the meaning of the treaties before us.

Counsels' submission on extraneous evidence is based on court decisions about how courts should treat such evidence in interpreting treaties. But for us to accept the courts' way of doing things would not only be contrary to the objectives proclaimed in *Outstanding Business*, it would be contrary to the terms and spirit of our mandate. We are authorized "to adopt such methods . . . as we may consider expedient for the proper conduct of the inquiry."

We therefore make the following recommendation:

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[162] *Outstanding Business*, p.19.

[163] Ibid.

RECOMMENDATION I

> **The parties should remain mindful of the spirit and intent of the Policy and process, which is to encourage and support the fair negotiation of outstanding claims. This is best done without the application of technical court rules and procedures.**

With respect to the three issues set out in Part V, we made a number of findings. Regarding Issue 1, dealing with the geographical scope of Treaties 8 and 10, we found that the geographical scope of the treaties is as set out in the Metes and Bounds descriptions contained in the treaties. We found no evidence to support the claimants' position that the treaty boundaries in fact ought to be extended northward to include all of the Denesųłiné's traditional lands.

Regarding Issue 2, dealing with the applicability of the Harvesting Rights clause beyond the boundaries of the treaties, we made a number of findings. We found that Treaties 8 and 10 are essentially identical in construction and wording and that, based on the grammar and language of both treaties, the Treaty Harvesting clause applies to all lands surrendered by the claimants. Therefore the Treaty Harvesting clause applies to those lands surrendered pursuant to both the Metes and Bounds description and the Blanket Extinguishment clause. This means that the claimants have treaty harvesting rights in the Northwest Territories, outside the Metes and Bounds descriptions contained in the treaties.

We considered the above findings in light of the historical evidence, and found both the conduct and representations leading up to the negotiation and signing of the treaties, and the conduct of the parties after the treaties were signed, to be consistent with our interpretation of the treaties.

Regarding Issue 3, dealing with lawful obligation, we found that a *breach* of lawful obligation is not required by the Policy. Instead, we found that what is required by the Policy is that Canada must have an *outstanding* lawful obligation to the claimants. We further found that Canada does have an outstanding lawful obligation to recognize the treaty harvesting rights of the claimants in this matter.

Dealing with Canada's submission that this means the claimants are seeking declaratory relief, we found that this is not the case, a finding consistent with our previous interim ruling in this matter.[164] Declaratory relief is a judicial remedy that we cannot grant, as we are not a court of law.

With respect to the submission of Canada that the claimants must also have damages compensable by land or money, we found that was an overly narrow interpretation of the Policy. We found that the proper test set out in the Policy is that the claimants must have some loss or damage that is capable of being negotiated under the Policy. We found that the claimants do not at present have such a loss or damage, as their treaty harvesting rights have not, as yet, been interfered with.

Counsel for the Government of Canada, at least by implication, suggest in their oral submissions that Article 40 of the Tungavik Federation of Nunavut Agreement (TFN Agreement)[165] protects any treaty or aboriginal rights the claimants may have to the area in issue.[166] Further Canada states that, "the Claimants are continuing their harvesting activities and that the claimants have not suggested otherwise."[167] The claimants, on the other hand, express the following concern:

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[164] See Appendix A.

[165] This agreement between the Inuit of the Eastern Arctic and the Government of Canada, together with the Government of the Northwest Territories creates the Nunavut territory. It is said by the Inuit who live there to settle and bring certainty to the question of ownership and management of lands and resources in the Nunavut territory. See Canada, House of Commons, Standing Committee on Aboriginal Affairs, *Minutes of Proceedings and Evidence*, No. 37 (March 10, 1993), Hon. Thomas E. Siddon, Minister of Indian and Northern Affairs Canada. Section 40 deals with overlapping interests or claims of other aboriginal peoples.

[166] ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, p. 131 (Mr. Daigle).

> [T]he Denesuline fear that, once the T.F.N. Agreement is in place, that Agreement will become irreversible, and it will be difficult, if not impossible, for the Denesuline to attain any recognition of their treaty rights in respect of lands covered by the Agreement.[168]

While there appears to be a serious disagreement as to whether or not the treaty rights of the claimants are sufficiently protected by the above clause. That issue was not placed before this Commission to make findings upon, *at this time*. Accordingly, we make no findings on that issue, but we do recommend that the parties before this Commission make a serious effort to find some means to discuss this matter and resolve it to their mutual satisfaction.

In our view this would be an appropriate time for Canada to exercise its policy of "Administrative Referral."[169] This matter appears to us to be a case where there is "a problem [that] can and should be redressed by direct administrative action" by the federal government.[170]

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[167] ICC, Submissions on Behalf of the Government of Canada, p. 39.

[168] Indian Claims Commission Jurisdiction Report, Fond du Lac, Black Lake, and Hatchet Lake First Nations, January 22, 1993, p. 2.

[169] See *Federal Policy for the Settlement of Native Claims*, p. 25: Administrative Referral claims are described as being "[a]dministrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process." And at page 29 the publication reads, "[h]owever, in (cases where the federal government has not breached its lawful obligation) there may, nonetheless, be legitimate grievances that could be negotiated in a negotiated settlement. An example is the situation at Kanesatake."

[170] See, Ibid., p. 25. See also ICC, Submissions on Behalf of the Government of Canada, p. 11, where Canada states that claims such as those before us are dealt with through litigation or on an *ad hoc* basis. Further, in oral submissions, counsel for Canada stated that *ad hoc* claims were "claims where the litigator feels that they shouldn't go to court for some reason or other." ICC, Submissions from Counsel for the Participants (transcript), September 17, 1993, p. 125 (Mr. Daigle).

As we have said several times herein, the treaty harvesting rights of the claimants extend north of 60° latitude. The question whether they are adequately protected in accordance with the prevailing law is a matter for the parties. It is our view that should the claimants be denied the exercise of their rights, as provided by treaty and law, there would then be a "non-fulfillment of a treaty . . . capable of being negotiated" pursuant to the Specific Claims Policy. Part of Canada's "lawful obligation" is to ensure that doesn't occur.

RECOMMENDATION II

> ***Outstanding Business*** **does not strictly allow for the negotiation of this claim. However, other processes for negotiation of similar issues have been established by Canada, one of which is described as "Administrative Referral." As soon as possible, the parties should commence negotiation of the claimants' grievance pursuant to that process.**

FOR THE INDIAN CLAIMS COMMISSION

Harry S. LaForme Chief Commissioner	Carol Dutcheshen Commissioner	Carole T. Corcoran Commissioner

December 21, 1993

APPENDIX A

INDIAN CLAIMS COMMISSION

ATHABASCA DENESULINE TREATY HARVESTING INQUIRY

RULING ON GOVERNMENT OF CANADA OBJECTION

Background

On December 21, 1992 the Athabasca Denesuline, comprising Black Lake, Hatchet Lake and Fond du Lac First Nations (the "Claimants"), requested that the Indian Claims Commission "conduct an inquiry into the denial of our Specific Claim by Canada". The Athabasca Denesuline argue that the terms of Treaties 8 and 10 include provision for, and protection of, their rights to hunt, fish and trap in areas of the Northwest Territories which are north of the 60th Parallel and outside the fixed boundaries described in those treaties.

The Athabasca Denesuline further contend that the Minister of Indian Affairs and Northern Development (the "Minister") has rejected their claim. On June 8, 1989 Mr. John F. Leslie of the Department advised the Denesuline that "your proposal [for funding] does not constitute a specific or comprehensive claim". On June 12, 1991 then Deputy Minister Harry Swain wrote to Tribal Chief A.J. Felix saying, "our legal advice is that your aboriginal rights in land north of 60 [degrees] were surrendered by Treaties 5, 8 and 10 and that

actual treaty harvesting rights do not extend beyond the boundary of those treaties". On September 10, 1991 the Minister wrote to the same effect: "I agree with what my Deputy Minister, Mr. Harry Swain, indicated in his June 12, 1991 letter to you respecting your harvesting rights . . . "..

On January 22, 1993 the Commission agreed to conduct this inquiry and notices of that decision were sent to the parties on January 25, 1993.

The Commission is not being asked to investigate any claim based on unextinguished aboriginal or native title; nor is the Commission being asked to review the Nunavut Agreement. The fact that the Commission would not pursue such lines of inquiry was communicated to the parties at a meeting held in Toronto on April 1, 1993.

At that meeting, Mr. Winogron, counsel for the Government of Canada in this matter, indicated that Government may object to the jurisdiction of the Commission to conduct this inquiry. He was advised by Commission Counsel at that time, and subsequently by letter dated April 5, 1993, that any objection should be made to the Commissioners in a timely fashion (the date of April 13 was suggested) setting out detailed grounds for the objection coupled with a request for a ruling from the Commissioners.

Timeliness is a factor in this matter since a panel of the Commission, consisting of Chief Commissioner Harry S. LaForme, Commissioner Carole Corcoran and Commissioner Carol A. Dutcheshen, is scheduled to commence the community phase of this inquiry at Fond du Lac, Saskatchewan on Monday, May 10, 1994.

On May 6, 1993, a panel consisting of Chief Commissioner Harry S. LaForme together with Commissioners Carole Corcoran, Carol A. Dutcheshen, James Prentice, Dan Bellegarde and Roger Augustine, convened to hear the jurisdictional objection raised by the Government of Canada.

The Objection

Mr. Winogron wrote to the Chief Commissioner on April 13, 1993 to formally advise of the [Government's] objection. His letter is attached. The grounds of objection may be summarized as follows:

(1) The Claimants seek a declaration of rights as opposed to compensation or damage arising from a breach of lawful obligation on the part of Government. Such a declaration is not envisioned, defined or otherwise provided for by the Specific Claims Policy (the "Policy") and is not the proper subject matter of a specific claim;

(2) The Claimants' request does not involve an "outstanding lawful obligation" as contemplated by the Policy;

(3) The Claimants have not submitted this claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

The mandate of this Commission is set out in Order-in-Council P.C. 1992-1730, which states the following:

> **AND WE DO HEREBY advise that our Commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development (hereinafter "the Minister"), by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:**
>
> **(a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and**
>
> **(b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.**

Ruling

Mr. Winogron submits that the Commission should stop this inquiry.

His first objection is that we have no power to make a declaration of rights or to grant declaratory relief. In our view, we have not been asked to do that. The Commission has in fact been asked only to conduct an inquiry into the denial of the Bands' specific claim. Reference may be had in that regard to the December 21, 1992 letter from the Bands' legal counsel.

Our mandate is to inquire into and report on "whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister." When we have conducted an inquiry, we are "directed" by the Order-in-Council "to submit our findings and recommendations to the parties" and to report to the Governor in Council. We propose to do that and nothing more.

Mr. Winogron then argues that we should not consider the claim because the Claimants have not submitted it to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development. The Order-in-Council creating this Commission refers expressly to a rejection of a claim by the Minister. There is nothing in those terms of reference that confines the Commission to claims rejected in a particular way. Moreover, Mr. Winogron acknowledges that the Bands are entitled to regard the Department of Indian and Northern Affairs response of June 8, 1989 as a rejection of their claim.

Apart from that, the above argument is a somewhat extraordinary submission in the circumstances of this claim. The Department's rejection resulted from a request for funding to pursue the claim through the very process to which Mr. Winogron points. The Department refused to provide funds to allow the claim to go through the process. Mr. Winogron now argues that because the claim has not gone through the process we cannot consider it. With respect, we disagree.

Finally, Mr. Winogron submits that the claim is not one provided for in the Policy because it does not involve an "outstanding lawful obligation" as contemplated by that Policy.

We have been asked by the Claimants to inquire into their claim that they have rights under Treaties 8 and 10 to harvest by hunting, fishing and trapping in areas of the Northwest Territories north of the 60th parallel.

The term "Specific Claim" is defined in the booklet setting out the 1982 Policy, "*Outstanding Business*," which is incorporated into our terms of reference. Mr. Winogron accepts that the definition of "specific claim" is found in *Outstanding Business.* On page seven of *Outstanding Business* "Specific Claim" is defined as referring "to those claims which relate to the administration of land and other Indian assets and to the fulfillment of treaties". This definition is repeated on page nineteen under the general heading "The Policy: A Renewed Approach to Settling Specific Claims".

On page 20, *Outstanding Business* states "the government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding 'lawful obligation'. "

Outstanding Business goes on to say "a lawful obligation may arise in any of the following circumstances:

> i) The non-fulfillment of a treaty or agreement between Indians and the Crown".

The Claimants' position is that the Government has refused on more than one occasion to "recognize" this claim to treaty rights and that the Minister has specifically rejected the Bands' claim that these treaty rights exist. They rely on letters written by the Minister or on his behalf which they have filed to demonstrate this.

The Government position is that in order to fall within the Policy, as stated in *Outstanding Business*, a claim must be one that can be compensated by way of land or money. Mr. Winogron argues that because *Outstanding Business* contemplates compensation for a breach of lawful obligation in terms of land or money, that is the only kind of claim into which the Commission is authorized to inquire. Mr. Winogron submits that this is not such a claim.

This Commission has been mandated to inquire into and report on whether Claimants have a valid claim under the specific claims policy in circumstances where the Minister has rejected the claim. We consider it premature to dispose of Mr. Winogron's argument that this claim does not fall within *Outstanding Business* until such time as we have completed the inquiry. The very purpose of the inquiry is to decide whether or not there is a valid specific claim and whether it has been rejected. The issue which Mr. Winogron raises we regard as an important issue which we must consider as part of the overall inquiry.

Mr. Winogron argues that this Commission must be satisfied that the facts of this case fall squarely within the Policy before this Commission proceeds to an inquiry. We disagree. In our view, the Commission must, at this juncture, examine the circumstances of the case and need only be satisfied that:

1. **The claim has been advanced to the government;**

2. **The Claimants allege non-fulfilment of federal obligations under Treaties 8 and 10, to which they are parties;**

3. **The claim has been rejected by the Minister as a specific claim;**

4. **The claim has been advanced before this Commission by the Claimants as a matter still in dispute; and**

5. **The Claimants have an arguable case that their claim falls within the Policy.**

The Commissioners take the view that these requirements have been met and that the Commission has properly embarked upon its inquiry.

Throughout the inquiry, the Commission will keep in mind the points Mr. Winogron has raised, and it may be that we will have to return to them at a later point.

This matter was considered in Saskatoon on May 6, 1993 by the following Commissioners:

Chief Commissioner Harry S. LaForme
Commissioner Roger Augustine
Commissioner Daniel Bellegarde
Commissioner Carole Corcoran
Commissioner Carol A. Dutcheshen
Commissioner James Prentice

Dated this 7 May 1993

Harry S. LaForme, Chief Commissioner
for the INDIAN CLAIMS COMMISSION

Department of Justice Canada
Ministère de la Justice Canada

Ottawa, Canada
K1A 0H8

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Specific Claims Ottawa
DIAND Legal Services
Trebla Building, Room 1157
473 Albert Street

April 13, 1993

Harry S. LaForme
Chairman and Chief Commissioner
INDIAN CLAIMS COMMISSION
110 Yonge Street, Suite 1702
Canada Trust Building
Toronto, Ontario, M5C 1T4

Dear Mr. LaForme:

Athabaska Denesuline Claim - Indian Claims Commission

Further to our attendance at the consultation conference on the above matter on April 1, 1993, we are writing to formally advise of our objection to the Commission's jurisdiction to inquire into the Athabaska Denesuline matter.

The claimants have asked the Commission "to review Canada's blanket denial of the existence of any Denesuline treaty rights, including harvesting rights, in the N.W.T.". They claim to have treaty rights in their traditional territories in the N.W.T. and argue that "Treaties 8 and 10 cover all of the traditional lands of the Denesuline, notwithstanding that the descriptions of the treaty boundaries contained in the written versions of those treaties would exclude those traditional lands". Alternatively, they argue that their treaty rights to hunt, trap and fish extend beyond the current boundaries of these treaties in areas covered by the "blanket extinguishment clause" in the treaties.

The operative provision of the Order in Council establishing the Commission under Part I of the Inquiries Act states:

> "AND WE DO HEREBY advise that our commissioners on the basis of Canada's Specific Claims Policy published in 1982 and subsequent formal amendments or additions as announced by the Minister of Indian Affairs and Northern Development, by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

> a) whether a claimant has a valid claim for negotiation under the Policy where the claim has already been rejected by the Minister;"

The Government's policy on specific claims states that it will:

> "recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived form the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfilment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land."

Based upon the above, our objections are as follows:

1) The claimant is not claiming any compensation or damage arising from the breach of a lawful obligation by the Crown. The claimant's request is not one which can be defined as a claim under the policy, but rather, they seek a declaration of treaty rights. Declaratory relief is properly a subject matter for the Federal Court of Canada and is not properly the subject matter of a specific claim under the Specific Claims Policy. The Commission's empowering Order-in-Council authorizes it to inquire into and report on whether the claimants have a valid claim on the basis of the policy. On the basis of the policy there can be no claim for declaratory relief since the policy does not provide for it, define it nor envision it.

2) The claimant's request is not a claim as provided for in the Specific Claims Policy. This request does not involve an "outstanding lawful obligation" as contemplated by the Policy.

3) The claimant has not submitted a claim to the Specific Claims and Treaty Land Entitlement Branch of the Department of Indian Affairs and Northern Development.

As a result the Commission is without jurisdiction to inquire into and report on a matter which is not a claim.

As per the instruction in Mr. Henderson's letter of April 5, 1993, we are requesting a ruling from the Commissioners with respect to this matter.

We look forward to hearing from you.

Robert Winogron

c.c. Carol A. Dutcheshen
Carole Corcoran
Bill Henderson
David Knoll

RW/nvc

APPENDIX B

ATHABASCA DENESŲŁINÉ INQUIRY

1 Decision to conduct inquiry January 25, 1993

2 Notices sent to parties January 25, 1993

3 Consultation conference April 1, 1993

The consultation conference was held with representatives of the Athabasca Denesųłiné First Nation, Canada, and the Indian Claims Commission at our Toronto office. Matters discussed included the mandate of the Commission, hearing dates, translation/transcription of information, consolidation of documents, procedural and evidentiary rules, the scope of the inquiry, the presentation of legal argument by the participants, and other matters related to the conduct of the inquiry.

4 Hearing on Mandate of Commission, Saskatoon May 6, 1993

5 Community sessions

The panel held community sessions at Fond du lac, Saskatchewan, on May 11-12, 1993, hearing from 18 members of the Fond du Lac, Black Lake, and Hatchet Lake First Nations.

May 11: Louis Benoanie, Jimmy Dzeylion, Bart Dzeylion, John Besskaytsare, Edward Tsannie, Martin Josee, Leon Fern (Samuel), Celeste Randhile, Fred Adams, and Norbert Deranger.

May 12: Senator Louis Chicken, Charlie Throssie, Joe Cheba, J.B. Bigeye, Isaac Skull, Napolean McKenzie, Moise Yooya, and John Lidguerre.

6 Oral submissions, Saskatoon September 17, 1993

7 Content of formal record

The formal record for the Athabasca Denesųłiné Inquiry consists of the following materials:

- Documentary record (3 volumes of documents, 1 addendum volume, 1 index and 1 volume of affidavits)
- Athabasca Denesųłiné transcript from community sessions (2 volumes)
- Written submissions of counsel for Canada and the claimants
- Transcripts of oral submissions (2 volumes dated May 6, 1993, and September 17,1993)
- Ruling of the Commission on mandate to conduct the inquiry, May 7, 1993
- Book of Authorities and
- Exhibits tendered during the inquiry.

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

APPENDIX C

PROCEDURES OF THE ATHABASCA DENESŲŁINÉ INQUIRY

At the beginning of the community sessions, Chief Commissioner LaForme called the session to order and invited an elder to open the meeting with a prayer. Chief Joe Marten of Fond du Lac then made some introductory comments. The Chief Commissioner followed with a brief explanation to the community of what the role of the Commission is and what the scope of the inquiry would be. Commission counsel introduced all other counsel and provided the Commissioners with notice that documents relating to the mandate of the Commission would be included in the formal record. Other formalities would be dealt with in the course of the inquiry.

Commission counsel then briefly described the procedures that the parties had agreed to in advance of the community session, subject to approval of the panel, which was given. It was noted for the record that the Commissioners have the authority to prescribe any procedure they deem appropriate in the circumstances of the inquiry.

Simultaneous translation of the proceedings was provided to give the elders an opportunity to give information and to follow the proceedings in their own languages. The interpreters were later given the opportunity to review the tapes of their translation to ensure that the written transcript would be as complete and accurate as possible.

Witnesses were called and assisted by Commission counsel. They were not sworn in or asked to affirm their evidence on oath. All questions were directed through Commission counsel, with the Commissioners reserving the right to interject at any time. When other counsel wished to raise questions, this was done by providing them in writing to Commission counsel, who would then direct the questions to the witness. Witnesses were not subject to cross-examination.

The Commissioners did not adopt any formal rules of evidence in relation to the community information or documents they were prepared to consider.

APPENDIX D

TREATY No. 8.

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:—

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendant General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her

Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:—

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, HAVE HEREUNTO SET THEIR HANDS at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Albert Tate and Samuel Cunningham, Interpreters.

Father A. Lacombe,
Geo. Holmes,
†E. Grouard, O.M.I.
W. G. White,
James Walker,
J. Arthur Coté,
A. E. Snyder, Insp. N.W.M.P.,
H. B. Round,
Harrison S. Young,
J. F. Prud'homme,
J. W. Martin,
C. Mair,
H. A. Conroy,
Pierre Deschambeault,
J. H. Picard,
Richard Secord,
M. McCauley.

David Laird, *Treaty Commissioner*,
J. A. J. McKenna, *Treaty Commissioner*,
J. H. Ross, *Treaty Commissioner*,
his
Kee noo shay oo x *Chief*,
mark
his
Moostoos x *Headman*,
mark
his
Felix Giroux x *Headman*,
mark
his
Wee chee way sis x *Headman*,
mark
his
Charles Nee sue ta sis x *Headman*,
mark
his
Captain x *Headman*, from Sturgeon
mark Lake.

In witness whereof the Chairman of Her Majesty's Commissioners and the Headman of the Indians of Peace River Landing and the adjacent territory, in behalf of himself and the Indians whom he represents, have hereunto set their hands at the said Peace River Landing on the first day of July in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Boucher, interpreters.

David Laird, *Chairman of Indian Treaty Commissioners,*
his
Duncan x Tastaoosts, *Headman of Crees*
mark

A. Lacombe.
†E. Grouard, O.M.I., Ev. d'Ibora,
Geo. Holmes,
Henry McCorrister,
K. F. Anderson, Sgt., N.W.M.P.
Pierre Deschambeault,
H. A. Conroy,
T. A. Brick,
Harrison S. Young,
J. W. Martin,
David Curry.

In witness whereof the Chairman of Her Majesty's Commissioners and the Chief and Headmen of the Beaver and Headman of the Crees and other Indians of Vermilion and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at Vermilion on the eighth day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Father A. Lacombe and John Bourassa, Interpreters.

David Laird,
Chairman of Indian Treaty Coms.,
his
Ambrose x Tete Noire, *Chief Beaver Indians.*
mark
his
Pierrot x Fournier, *Headman Beaver Indians.*
mark
his *Headman*
Kuis kuis kow ca poohoo x *Cree*
mark *Indians.*

A. Lacombe,
†E. Grouard, O.M.I., Ev. d'Ibora,
Malcolm Scott,
F. D. Wilson, H. B. Co.,
H. A. Conroy,
Pierre Deschambeault,
Harrison S. Young,
J. W. Martin,
A. P. Clarke,
Chas. H. Stuart Wade,
K. F. Anderson, Sgt., N.W.M.P.

In witness whereof the Chairman of Her Majesty's Treaty Commissioners and the Chief and Headman of the Chipewyan Indians of Fond du Lac (Lake Athabasca) and the adjacent territory, in behalf of themselves and the Indians whom they represent, have hereunto set their hands at the said Fond du Lac on the twenty-fifth and twenty-seventh days of July, in the year of Our Lord one thousand eight hundred and ninety-nine.

Signed by the parties hereto in the presence of the undersigned witnesses, the same having been first explained to the Indians by Pierre Deschambeault, Reverend Father Douceur and Louis Robillard, Interpreters.

DAVID LAIRD,
Chairman of Indian Treaty Coms.,
his
LAURENT x DZIEDDIN, *Headman*,
mark
his
TOUSSAINT x *Headman*,
mark

(The number accepting treaty being larger than at first expected, a Chief was allowed, who signed the treaty on the 27th July before the same witnesses to signatures of the Commissioner and Headman on the 25th.)

his
MAURICE x PICHE, *Chief of Band.*
mark
Witness, H. S. YOUNG.

G. BREYNAT, O.M.I.,
HARRISON S. YOUNG,
PIERRE DESCHAMBEAULT,
WILLIAM HENRY BURKE,
BATHURST F. COOPER,
GERMAIN MERCREDI,
his
LOUIS x ROBILLARD,
mark
K. F. ANDERSON, *Sgt., N.W.M.P.*

The Beaver Indians of Dunvegan having met on this sixth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to then the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Headman of the said Beaver Indians have hereunto set their hands at Dunvegan on this sixth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses, after the same had been read and explained to the Indians by the Reverend Joseph Le Treste and Peter Gunn, Interpreters.

J. H. ROSS,
J. A. J. MCKENNA, *Commissioners*,
his
NATOOSES x *Headman*,
mark

A. E. SNYDER, *Insp. N.W.M.P.*
J. LE TRESTE,
PETER GUNN,
F. J. FITZGERALD.

The Chipewyan Indians of Athabasca River, Birch River, Peace River, Slave River and Gull River, and the Cree Indians of Gull River and Deep Lake, having met at Fort Chipewyan on this thirteenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chiefs and Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort Chipewyan on this thirteenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Peter Mercredi, Chipewyan Interpreter, and George Drever, Cree Interpreter.

A. E. Snyder, *Insp., N.W.M.P.*,
P. Mercredi,
Geo. Drever,
L. M. Le Doussal,
A. de Chambour, O.M.I.
H. B. Round,
Gabriel Breynat, O.M.I.,
Colin Fraser,
F. J. Fitzgerald,
B. F. Cooper,
H. W. McLaren,

J. H. Ross,
J. A. J. McKenna, } *Treaty Commissioners*,
his
Alex. x Laviolette, *Chipewyan Chief*,
mark
his
Julien x Ratfat,
mark
his
Sept. x Heezell, } *Chipewyan Headmen*,
mark
his
Justin x Martin, *Cree Chief*,
mark
his
Ant. x Taccarroo,
mark
his
Thomas x Gibbot, } *Cree Headmen*.
mark

The Chipewyan Indians of Slave River and the country thereabouts having met at Smith's Landing on this seventeenth day of July, in this present year 1899, Her Majesty's Commissioners, the Honourable James Hamilton Ross and James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country, set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioners and the Chief and Headmen of the said Chipewyan Indians have hereunto set their hands at Smith's Landing, on this seventeenth day of July, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by John Trindle, Interpreter.

A. E. Snyder, *Insp. N.W.M.P.*,
H. B. Round,
J. H. Reid,
Jas. Haly,
John Trindle,
F. J. Fitzgerald,
Wm. McClelland,
John Sutherland.

J. H. Ross,
J. A. J. McKenna, } *Treaty Commissioners*,
his
Pierre x Squirrel, *Chief*,
mark
his
Michael x Mamdrille, *Headman*,
mark
his
William x Kiscorray, *Headman*,
mark

The Chipewyan and Cree Indians of Fort McMurray and the country thereabouts, having met at Fort McMurray, on this fourth day of August, in this present year 1899, Her Majesty's Commissioner, James Andrew Joseph McKenna, Esquire, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Headmen of the said Chipewyan and Cree Indians have hereunto set their hands at Fort McMurray, on this fourth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by the Rev. Father Lacombe and T. M. Clarke, Interpreters

A. Lacombe, *O.M.I.*,
Arthur J. Warwick,
T. M. Clarke,
J. W. Martin,
F. J. Fitzgerald,
M. J. H. Vernon.

J. A. J. McKenna, *Treaty Commissioner,*
his
Adam x Boucher, *Chipewyan Headman,*
mark
his
Seapotakinum x Cree, *Cree Headman,*
mark

The Indians of Wapiscow and the country thereabouts having met at Wapiscow Lake on this fourteenth day of August, in this present year 1899, Her Majesty's Commissioner, the Honourable James Hamilton Ross, and having had explained to them the terms of the Treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June in the year herein first above written, do join in the cession made by the said Treaty and agree to adhere to the terms thereof in consideration of the undertakings made therein.

In witness whereof Her Majesty's said Commissioner and the Chief and Headmen of the Indians have hereunto set their hands at Wapiscow Lake, on this fourteenth day of August, in the year herein first above written.

Signed by the parties thereto in the presence of the undersigned witnesses after the same had been read and explained to the Indians by Alexander Kennedy.

A. E. Snyder, *Insp. N.W.M.P.*,
Charles Riley Weaver,
J. B. Henri Giroux, *O.M.I.*, *P.M.*,
Murdoch Johnston,
C. Falher, *O.M.I.*,
Alex. Kennedy, *Interpreter*,
H. A. Conroy,
(Signature in Cree character).
John McLeod,
M. R. Johnston.

J. H. Ross, *Treaty Commissioner,*
his
Joseph x Kapusekonew, *Chief,*
mark
his
Joseph x Ansey, *Headman,*
mark
his
Wapoose x *Headman,*
mark
his
Michael x Ansey, *Headman,*
mark
his
Louisa x Beaver, *Headman,*
mark

APPENDIX E

TREATY No. 10.

Articles of a treaty made and concluded at the several dates mentioned therein, in the year of our Lord one thousand nine hundred and six between His Most Gracious Majesty the King of Great Britain and Ireland by His commissioner, James Andrew Joseph McKenna, of the city of Winnipeg, in the province of Manitoba, Esquire, of the one part, and the Chipewyan, Cree and other Indian inhabitants of the territory within the limits hereinafter defined and described by their chiefs and headmen hereunto subscribed of the other part.

Whereas the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by His Majesty's said commissioner in the year 1906, been convened to meet His Majesty's said commissioner representing His Majesty's government of the Dominion of Canada at certain places in the said territory in this present year 1906 to deliberate upon certain matters of interest to His Most Gracious Majesty on the one part and the said Indians of the other.

And whereas the said Indians have been notified and informed by His Majesty's said commissioner that it is His Majesty's desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to His Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned and to obtain the consent thereto of his Indian subjects inhabiting the said tract and to make a treaty and arrange with them so that there may be peace and good will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council at the respective points named hereunder and being requested by His Majesty's said commissioner to name certain chiefs and headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon and to become responsible to His Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several chiefs and headmen who have subscribed hereto.

And whereas the said commissioner has proceeded to negotiate a treaty with the Chipewyan, Cree and other Indians inhabiting the said territory hereinafter defined and described and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder;

Now therefore the said Indians do hereby cede, release, surrender and yield up to the government of the Dominion of Canada for His Majesty the King and His successors for ever all their rights, titles and privileges whatsoever to the lands included within the following limits, that is to say:—

All that territory situated partly in the province of Saskatchewan and partly in the province of Alberta, and lying to the east of Treaty Eight and to the north of Treaties Five, Six and the addition to Treaty Six, containing approximately an area of eighty-five thousand eight hundred (85,800) square miles and which may be described as follows:—

Commencing at the point where the northern boundary of Treaty Five intersects the eastern boundary of the province of Saskatchewan; thence northerly along the said eastern boundary four hundred and ten miles, more or less, to the sixtieth parallel of latitude and northern boundary of the said province of Saskatchewan; thence west along the said parallel one hundred and thirty miles, more or less, to the eastern boundary of Treaty Eight; thence southerly and westerly following the said eastern boundary of Treaty Eight to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary of Treaty Six to its intersection with the western boundary of the addition to Treaty Six; thence northerly along the said western boundary to the northern boundary of the said addition; thence easterly along the said northern boundary to the eastern boundary of the said addition; thence southerly along the said eastern boundary to its intersection with the northern boundary of Treaty Six; thence easterly along the said northern boundary and the northern boundary of Treaty Five to the point of commencement.

And also all their rights, titles and privileges whatsoever as Indians to all and any other lands wherever situated in the provinces of Saskatchewan and Alberta and the Northwest Territories or any other portion of the Dominion of Canada.

To have and to hold the same to His Majesty the King and His successors for ever.

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And His Majesty the King hereby agrees and undertakes to set aside reserves of land for such bands as desire the same, such reserves not to exceed in all one square mile for each family of five for such number of families as may elect to reside upon reserves or in that proportion for larger or smaller families; and for such Indian families or individual Indians as prefer to live apart from band reserves His Majesty undertakes to provide land in severalty to the extent of one hundred and sixty (160) acres for each Indian, the land not to be alienable by the Indian for whom it is set aside in severalty without the consent of the Governor General in Council of Canada, the selection of such reserves and land in severalty to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that His Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band or bands as He may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by His Majesty's government of Canada for the use and benefit of the Indians entitled thereto, with their consent first had and obtained.

It is further agreed between His Majesty and His said Indian subjects that such portions of the reserves and lands above mentioned as may at any time be required for public works, buildings, railways or roads of whatsoever nature may be appropriated for such purposes by His Majesty's government of Canada due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area so appropriated.

And with a view to showing the satisfaction of His Majesty with the behaviour and good conduct of His Indians and in extinguishment of all their past claims, He hereby through His commissioner agrees to make each chief a present of thirty-two (32) dollars in cash, to each headman twenty-two (22) dollars and to every other Indian of whatever age of the families represented at the time and place of payment twelve (12) dollars.

His Majesty also agrees that next year and annually thereafter for ever He will cause to be paid to the Indians in cash, at suitable places and dates of which the said Indians shall be duly notified, to each chief twenty-five (25) dollars, each headman fifteen (15) dollars and to every other Indian of whatever age five (5) dollars.

Further His Majesty agrees that each chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year and every third year thereafter each chief shall receive a suitable suit of clothing, and that after signing the treaty each headman shall receive a bronze medal and next year and every third year thereafter a suitable suit of clothing.

Further His Majesty agrees to make such provision as may from time to time be deemed advisable for the education of the Indian children.

Further His Majesty agrees to furnish such assistance as may be found necessary or advisable to aid and assist the Indians in agriculture or stock-raising or other work and to make such a distribution of twine and ammunition to them annually as is usually made to Indians similarly situated.

And the undersigned Chipewyan, Cree and other Indian chiefs and headmen on their own behalf and on behalf of all the Indians whom they represent do hereby solemnly promise and engage to strictly observe this treaty in all and every respect and to behave and conduct themselves as good and loyal subjects of His Majesty the King.

They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace between each other and between their tribes and other tribes of Indians and between themselves and other of His Majesty's subjects whether whites, Indians, half-breeds or others now inhabiting or who may hereafter inhabit any part of the territory hereby ceded and herein described, and that they will not molest the person or trespass upon the property or interfere with the rights of any inhabitant of such ceded tract or of any other district or country or interfere with or trouble any person passing or travelling through the said tract or any part thereof and that they will assist the officers of His Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty or infringing the law in force in the country so ceded.

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Isle à la Crosse this twenty-eighth day of August in the year herein first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by Magloire Maurice, interpreter.
J. V. BEGIN,
Supt., R.N.W.M. Police.
I. RAPET, ptre, O.M.I.,
CHAS. FISHER,
CHAS. MAIR,
ANGUS MCKAY,
D. MCKENNA,
T. DAVIS.

J. A. J. McKENNA,
Commissioner.
his
WILLIAM X APISIS,
mark
Chief of the English River Band.
his
JOSEPH X GUN,
mark
Headman.
his
JEAN BAPTISTE X ESTRALSHENEN, mark
Headman.
his
RAPHAEL X BEDSHIDEKKGE,
mark
Chief of Clear Lake Band.

Signed by the Chief and Headman of the Canoe Lake band, this 19th day of September, A.D. 1906. The treaty having been read over and explained by Archie Park, interpreter, in the presence of the undersigned witnesses.
J. V. Begin,
Supt., R.N.W.M.P.,
L. Cochin, ptre, O.M.I.,
J. E. Teston, ptre, O.M.I.,
F. E. Sherwood,
Const., R.N.W.M. Police,
his
Archie x Park, Interpreter.
mark
Charles Mair,

his
JOHN X IRON,
mark
Chief of Canoe Lake Band.
his
BAPTISTE X IRON,
mark
Headman, Canoe Lake Band.

his
JEROME X COUILLONEUR,
mark
Headman, Canoe Lake Band.

Articles of a treaty made and concluded at the several dates mentioned therein, in the year of our Lord one thousand nine hundred and seven, between His Most Gracious Majesty the King of Great Britain and Ireland by His Commissioner Thomas Alexander Borthwick, of Mistawasis, in the province of Saskatchewan, Esquire, of the one part, and the Chipewyan, Cree and other Indian inhabitants of the territory within the limits hereinafter defined and described by their chiefs and headmen hereunto subscribed of the other part.

* * * * * * *

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Lac du Brochet this 19th day of August, in the year first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by A. Turquetil.
Charles La Violette,
Interpreter.
W. J. McLEAN, *Witness.*
A. W. Bell, *Witness.*
Thomas Borthwick,
Commissioner, Treaty No. 10.

his
PETIT X CASIMIR,
mark
Chief of Barren Land Band.
his
JEAN X BAPTISTE,
mark
Headman of Barren Land Band.
his
ANDRE X ANTSANEN,
mark
Indian of Barren Land Band.

In witness whereof His Majesty's said commissioner and the chiefs and headmen have hereunto set their hands at Lac du Brochet this 22nd day of August in the year first above written.

Signed by the parties hereto in the presence of the undersigned witnesses the same having first been explained to the Indians by E. S. Turquetil, interpreter.
Witness A. W. Bell,
" W. J. McLean.

his
THOMAS X BENAOUNI,
mark
Chief of Hatchet Lake Band.
Witness A. W. BELL,
his
PIERRE X AZE.
mark
Headman of Hatchet Lake Band.

THOS. BORTHWICK,